

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

76-7272

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
RICHARD S. KAYE,

Plaintiff-Appellant,

-against-

FUNDING SYSTEMS CORPORATION,

Defendant,

-and-

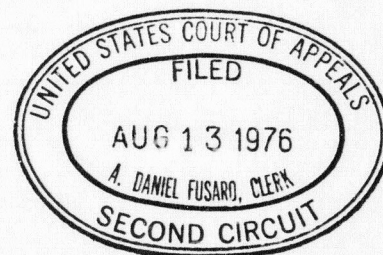
EQUIMARK CORPORATION,

Defendant-Appellee.
-----x

B
P/S
Docket No.
76-7272

JOINT APPENDIX

Volume III



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Appellant
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New York, New York 10017

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AFFIDAVIT IN OPPOSITION TO
MOTION TO DISMISS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - -x

RICHARD S. KAYE, :
 :
Plaintiff, : 74 Civ. 5628 (R.L.C.)
 :
-against- :
 :
 : AFFIDAVIT
FUNDING SYSTEMS CORPORATION :
and EQUIMARK CORPORATION, :
 :
Defendants. :
 :
- - - - -x

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

JOHN M. BURNS, III, being duly sworn, deposes and says:

1. I am an attorney admitted to practice before this Court; I am a member of Alexander, Katz & Rosenberg, the attorneys for plaintiff herein and I make this affidavit in opposition to the motion of defendant Equimark Corporation ("Equimark") to dismiss this action on the ground that the Court does not have jurisdiction over its subject matter.

2. The relief requested should be denied because plaintiff has not had adequate opportunity to discover the facts and

Garland, Jr. and Floyd R. Ganassi. Plaintiff was in possession of information to the effect that Mr. Garland is a member of a Pittsburgh law firm which appears to have done substantial legal work for Equimark and for its chairman and chief executive officer, M.A. Cancelliere, and that other companies owned by Messrs. Garland and Ganassi may have substantial obligations to Equimark.* This information, in view of the United States Attorney's assertion on the record in United States v. Equimark Corporation (D. Md. Crim. No. N-75-0477) that in connection with another violation by Equimark of the Bank Holding Company Act that Equimark

"* * * did obtain indirect control and ownership and did manage and control the affairs of Landmark Finance Corporation, all without prior approval of the Board of Governors of the Federal Reserve System",

prompted plaintiff to believe that there is a reasonable possibility that, despite the ostensible sale of its stock in FSC, Equi-

* The FSC Proxy Statement dated October 22, 1975 stated that:

"Certain of the enterprises other than the Company (FSC) in which Mr. Garland and Mr. Ganassi are involved have outstanding loans from Equibank in amounts ranging from approximately \$6,000 to \$1,500,000."

circumstances of Equimark's alleged divestiture of the majority of the outstanding common stock of Funding Systems Corporation ("FSC") and those facts and circumstances are exclusively in the possession and control of the defendants.

3. This is an action by a shareholder of FSC which seeks equitable relief only and no money award except for costs and disbursements and reasonable attorneys fees. The complaint asserts that Equimark obtained a controlling interest in FSC in violation of various sections of the Bank Holding Company Act and used its resultant absolute control over the affairs of FSC to waste the assets of FSC and to deny to plaintiff and other shareholders of FSC the right to control the business affairs of FSC. The complaint seeks, inter alia, an order preventing Equimark from exercising this allegedly unlawfully-acquired control over the business affairs of FSC.

4. Equimark claims that by reason of an alleged sale of its common stock in FSC it has divested itself of control over the affairs of FSC and the action is therefore moot. Plaintiff, of course, was not privy to the facts and circumstances of that alleged transaction. It appears from papers provided by Equimark, however, that the stock in question was sold by Equimark to G. Gray

mark may have retained control over the affairs of FSC and this control exists solely because of Equimark's initial unlawful act in acquiring a majority of the outstanding common stock of FSC. Plaintiff's suspicion was further aroused when he compared the letter of M.A. Cancelliere of September 13, 1973 to the Federal Reserve Board indicating an absence of interest in a company known as Atlantic-Phoenix Life Insurance Company (see Exhibit "1" hereto) with Atlantic-Phoenix's 1973 year end filing with the Arizona Insurance Department in which Atlantic-Phoenix stated

"* * * Equimark Corporation may be considered the ultimate controlling person (of Atlantic-Phoenix)."

It appears that Equimark makes a practice of asserting control through nominees.

5. As a consequence of this suspicion, plaintiff did not accept Equimark's claim that its disposition of the stock had mooted the issues before this Court, because the real issue is whether Equimark's unlawful act had wrongfully afforded Equimark control over the affairs of FSC and whether Equimark should be restrained from exercising that unlawfully-acquired control, regardless of the form which it now takes. As a consequence, plaintiff sought a conference with this Court which was held on Novem-

ber 5, 1975, and this Court informally requested the defendants to produce Equimark's chairman and chief executive officer, M.A. Cancelliere, for deposition in recognition of plaintiff's asserted belief that Mr. Cancelliere was the officer of Equimark having the greatest knowledge of the facts which establish Equimark's retained control over the affairs of FSC. Equimark refused to produce Mr. Cancelliere, and it became necessary for plaintiff to file a notice of motion to compel Equimark to produce Mr. Cancelliere. Equimark resisted this motion and the Court, unfortunately, ordered plaintiff to accept the opportunity to depose a Mr. Kastelic, an officer of Equimark whom plaintiff believed not to be familiar with all of the facts and circumstances surrounding the questioned transaction. Furthermore, the Court unfortunately limited the scope of the discovery to the question of "the validity of the FSC sale of stock" (a copy of the Court's order is annexed to Equimark's moving papers as Exhibit "G").

6. In order to preserve his rights to continue this action and in order to comply with the tenor of the Court's order, even though plaintiff disagreed with the Court's decision in that it appears to prevent full and complete discovery and directs discovery toward an issue which is not the main issue now before the Court, plaintiff duly conducted the deposition of Mr. Kastelic.

For reasons stated hereinafter, that deposition was as useless as had been predicted by plaintiff at the outset in that Mr. Kastelic did not have relevant information in his possession and was flatly wrong in certain of his testimony, thus evidencing either an unusual lack of knowledge about the affairs of Equimark or a misunderstanding of the proper purposes of a deposition. Plaintiff then requested that the Court permit the filing of additional papers to establish his right to conduct further discovery of Equimark, but the Court, through his clerk, Mr. Fagan, denied permission. Hence, the issues now raised could not be raised before the Court prior to Equimark's filing the within motion.

7. The deposition of Mr. Kastelic was unfruitful for the following reasons, none of which was the fault of plaintiff (references are to the transcript of the deposition, a copy of which is annexed hereto as Exhibit "2").

(a) Mr. Kastelic was aware that FSC owed Equimark or its subsidiaries a total of \$20,922,000 in December of 1975 (p. 64). Obviously, the terms of the loan documents governing these loans, which had been incurred at the time that Equimark owned a majority interest in FSC, could be sources of control over the business affairs of FSC. Mr. Kastelic was aware that changes had

been made in the terms of the loan document during 1975 (p. 85) but he was not familiar with these changes (p. 86). He also was aware that there were changes in the terms of the loan documents in 1976 (p. 86) but he was not familiar with these changes (p. 87). He knew that FSC owed more than \$5,000,000 to other banks (p. 67) but he did not testify as to what had happened in respect of these particular loans.

(b) Equimark's counsel would not permit Mr. Kastelic to testify as to the existence of any loans by Equimark or any of its subsidiaries to Mr. Garland or the law firm of which he is a member (p. 98), to Mr. Ganassi (pp. 98-99) or to any corporation to which Mr. Garland or Mr. Ganassi formed a part of the management group (pp. 100-101). Obviously, if such loans exist, they could be a source of control over Messrs. Garland and Ganassi who are the new owners of the majority of the stock of FSC.

(c) Mr. Kastelic did not know whether Mr. Garland or Mr. Ganassi were shareholders in Equimark (p. 93). FSC's Proxy Statement dated October 22, 1975 asserts that Mr. Garland owns 6,100 shares of common stock of Equimark (more, apparently, than any director of Equi-

mark other than M.A. Cancelliere). Hence, Mr. Garland is, at least, a friendly hand in which to place the FSC stock.

(d) Plaintiff was in possession of information to the effect that the law firm of which Mr. Garland is a member had on some occasions represented Equimark or its subsidiaries. Mr. Kastelic testified that he knew that Mr. Garland's law firm had represented Equibank in connection with two loans and that he would not know all such representations (pp. 96-97) and he did not testify as to the nature and extent of that representation. The house counsel to Equibank, who would have been familiar with these matters, was present at this deposition but Equimark refused to permit him to testify (p. 103). (Exhibit "3" (papers in three separate lawsuits involving over \$1,500,000 of claims) and Exhibit "4" (demand letters) establish that Mr. Garland's law firm's representation of Equibank is substantial.) Equimark's counsel refused to permit Mr. Kastelic to testify as to whether or not Mr. Garland or his law firm had ever represented Equimark's chairman and chief executive officer, M.A. Cancelliere. It is obvious that

legal representations of this type could afford Equimark continuing control over Mr. Garland's operation of FSC and, in fact, could suggest that Mr. Garland is nothing more than a nominee of Equimark in holding the FSC shares, for this would not be an unusual role for an attorney.

(e) Plaintiff desired to explore the determination of the price paid by Messrs. Garland and Ganassi for the FSC stock because it would be possible to infer, had the stock been sold for an exceedingly low price, that retention of some form of control by Equimark could have resulted in a lower purchase price. Thus, it was relevant to inquire as to Equimark's efforts to sell the stock prior to determining to sell it to Messrs. Garland and Ganassi. Although Mr. Kastelic was charged with the duty of selling the stock as early as 1974 (pp. 42-43, 46-48), he could not specifically recall whom he contacted as potential purchasers (pp. 43-44, 50). As of December 13, 1973, there was pending an offer to purchase the FSC stock from Equimark at a price of \$3.00 per share (see Exhibit "5" hereto), but Mr. Kastelic testified that he did not ever contact the offerers (pp. 55-59) and he could not recall if anyone else at Equimark had contacted

them (p. 61). In any event, he started his negotiations With Messrs. Garland and Ganassi by offering the stock at \$1.00 per share (p. 64) and they paid \$.55 per share.

(f) Mr. Kastelic was not sure whether he and the other Equimark people resigned before or after sale of the stock which occurred on April 22, 1975 (pp. 88-90) and he did not know whether he had attended a board meeting after that sale (pp. 90-91) and he had nothing with him to refresh his recollection.

(g) Prior to their purported purchase of Equimark's FSC stock, Messrs. Garland and Ganassi were elected as the major officers of FSC. Mr. Kastelic could not remember that board meeting (p. 23) or any of the discussions related to the decision to elect Messrs. Garland and Ganassi as officers of FSC (pp. 25-29) and he had nothing present to refresh his recollection. Obviously, Messrs. Garland and Ganassi were installed as officers of FSC to carry out the wishes of Equimark, and the practices established during this period could have been intended to have been carried over into the time period in which Garland and Ganassi are the purported owners of the FSC stock.

(h) Mr. Kastelic did not know whether Mr. Cancelliere owns any stock in any companies of which Messrs. Garland and Ganassi are part of the management (p. 102).

8. Therefore, it is quite apparent that plaintiff has not been afforded full discovery of information material to the claims of this lawsuit and which are exclusively in the possession and control of defendants. Therefore, Equimark's within motion should be in all respects denied.

/s/ JOHN M. BURNS, III

JOHN M. BURNS, III

Sworn to before me this
13th day of April, 1976.

Notary Public

EXHIBIT "1" TO AFFIDAVIT IN OPPOSITION
TO MOTION TO DISMISS

Equimark Corporation
Fifth Avenue and Smithfield Street
Pittsburgh, Pennsylvania 15222
412 471 8000

H. W. HUNING
VICE PRESIDENT

OCT 4 10 54 AM '73

FEDERAL RESERVE BANK
OF CLEVELAND

M. A. Concelliere
Chairman and President

September 13, 1973

| | | |
|-----------------|---|------|
| | ✓ | INT. |
| V.P. | ✓ | 1/2 |
| CHIEF EXAM | ✓ | |
| SUP. REVIEW | | |
| <i>Rental</i> | ✓ | |
| <i>Thompson</i> | ✓ | |
| INV. SEC'Y. | ✓ | |
| S.P. INV. () | ✓ | |
| V.P. SEC'Y. | | |
| FILE | ✓ | |

Mr. Theodore E. Allison
Assistant Secretary of Board
Board of Governors of Federal Reserve System
Washington, D. C. 20551

Dear Mr. Allison:

Your letter of August 21 regarding certain offices of First Provident Company, Inc. and the subsequent events and conferences with the legal staff of the Board have caused Equimark to initiate a complete review of the operations of its consumer finance subsidiary, Atlantic Management Corporation.

In view of the facts as developed, and to avoid any further conflict concerning the Provident offices, we now wish to withdraw the Equimark application to acquire the six offices. Plans are being made to divest these offices at the earliest practical opportunity.

In addition, we request that the application of Equimark to acquire Atlantic-Phoenix Life Insurance Company be held in abeyance pending our reexamination.

Although our inquiry is not yet complete, we also are giving serious consideration to the complete divestment by Equimark of Atlantic Management Corporation. In the meantime, we have acted to direct termination of certain methods of operation by Atlantic and plan to take other action as deemed necessary to bring its present operations within the full spirit of the Bank Holding Company Act.

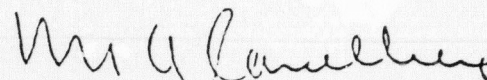
Mr. Theodore E. Allison

-2-

September 13, 1973

We shall keep your office currently informed of developments in this matter.

Very truly yours,



M. A. Cancelliere
Chairman and President
Equimark Corporation

cc: Mr. Brenton Leavitt
Program Director for Banking Structure
Board of Governors of Federal Reserve System

Mr. Willis Winn, President ✓
Federal Reserve Bank of Cleveland

John Nicoll, Esquire
Associate Counsel
Federal Reserve Board

A-401,

BURNS AFFIDAVIT EXHIBIT "2"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
:
RICHARD S. KAYE,

Plaintiff,

-against-

FUNDING SYSTEMS CORPORATION
and EQUIMARK CORPORATION,

Defendants. :
-----X

Deposition of defendant EQUIMARK
CORPORATION by ROBERT F. KASTELIC, taken by
plaintiff, pursuant to Order, at the offices
of Messrs. Alexander, Katz & Rosenberg, 200
East 42nd Street, New York, N. Y., on March 1,
1976, at 10:00 a.m., before Fred Lorber, a
Certified Shorthand Reporter and Notary Public
of the State of New York.

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CERTIFIED SHORTHAND REPORTERS

15 PARK ROW, N.Y. 10038
PHONE: 249-5790

A-402

APPEARANCES:

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BY: ANDREW C. FREEDMAN, ESQ.,
Of Counsel

Messrs. WEBSTER & SHEFFIELD,
Attorneys for defendant Funding Systems
Corporation,
1 Rockefeller Plaza,
New York, N. Y. 10020
BY: ROGER L. WALDMAN, ESQ.,
Of Counsel

PRESENT:

RICHARD S. KAYE

J. ROSS

★ ★ ★ ★ ★ ★

A-403

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15 PARK ROW, N.Y. 10038

PHONE: 349-5760

2 ROBERT F. KASTELIC, called as
3 a witness by the plaintiff, being first duly
4 sworn by the Notary Public (Fred Lorber), testi-
5 fied as follows:

6 EXAMINATION BY MR. BURNS:

7 Q State your residence address, Mr. Kastelic.

8 MR. FREEDMAN: I don't think
9 that's really necessary. You can find him if you
10 want to.

11 MR. BURNS: It is normally pro
12 forma. I think we are entitled to it.

13 MR. FREEDMAN: I don't feel that
14 that's really necessary at this point. If it
15 becomes necessary I'll be very happy to have
16 the witness furnish it. I appreciate what you
17 said. It is pro forma. I think the real purpose
18 is to be able to locate the witness. And the
19 witness will be available if you should need him
20 in the future.

21 MR. BURNS: Are you instructing
22 him not to answer?

23 MR. FREEDMAN: Yes.

24 BY MR. BURNS:

25 Q Mr. Kastelic, you have heard your counsel's

1 instruction not to answer that question?

2 A Yes.

3 Q Do you intend to abide by that instruction?

4 MR. FREEDMAN: I object. I instruct
5 the witness not to answer the question. The client
6 follows my instructions when I give them to him.

7 Q Mr. Kastelic, did you hear the latest
8 instruction from your counsel?

9 A Yes, I did.

10 Q Do you intend to follow that instruction?

11 MR. FREEDMAN: I object. Again I
12 instruct him not to answer.

13 Q Mr. Kastelic, did you hear the latest
14 instruction from your counsel?

15 A Yes, I did.

16 Q Do you intend to follow that instruction?

17 MR. FREEDMAN: I object. I in-
18 struct him not to answer. And if you are going
19 to proceed on this line it is not going to get
20 us anywhere. Let's get to the issues which have
21 been presented by the court for consideration
22 today and let's not get bogged down in some petty
23 details.

24 Q Mr. Kastelic, did you hear your counsel's
25

1 latest instruction accompanied by his outburst?

2
3 MR. FREEDMAN: I object to the
4 characterization as an outburst. There's been
5 no outburst. And I instruct the witness not to
6 respond to the badgering by counsel for the
7 plaintiff. Let us proceed to take the deposi-
8 tion of the witness.

9 MR. BURNS: I think what we are
10 going to do at this point is to see if we can
11 get a meeting with Judge Carter because I think
12 this is not the kind of interruptive behavior
13 on the part of defendant's counsel, defendant
14 Equimark's counsel, that he would condone and I
15 don't think it was contemplated by his Order
16 calling for this deposition.

17 I frankly think if this is the
18 kind of behavior that we can expect from Equi-
19 mark's counsel, in the course of this deposition,
20 that there wouldn't be much gained because if he
21 won't even permit the witness to answer what he
22 admits as a pro forma question under normal
23 introductory questions, then we certainly can't
24 expect him to permit answers to questions that
25 may be even more significant and perhaps it is

1
2 better initially to go to the court and get a
3 ruling on his behavior.

4 MR. FREEDMAN: Mr. Burns,
5 I appreciate your position. I think you can
6 appreciate mine. That I'm interested in getting
7 at the facts which Mr. Kastelic is here to testify
8 to today, pursuant to the court's order of January
9 29th, and if you feel that in some way this
10 residence address of Mr. Kastelic is somehow
11 germane to your inquiry I would in the interest
12 of expediting and concluding this deposition, would
13 reconsider my objection in that light.

14 MR. BURNS: All right.

15 MR. FREEDMAN: But let it not be
16 construed as my unwillingness to go to Judge
17 Carter on issues which do not seem to be germane
18 to this inquiry. But I can see that this is
19 the way you are going to conduct the deposition,
20 then I will have to provide even more latitude
21 than I ordinarily provide in a deposition in order
22 to comply with the court's order and to expedite
23 this.

24 MR. BURNS: I appreciate that, if
25 that is indeed your attitude.

1
2 MR. FREEDMAN: I will go to Judge
3 Carter if it becomes necessary.

4 MR. BURNS: I'm sure you would be
5 happy to see Judge Carter.

6 MR. FREEDMAN: Of course I would.

7 Q The question, Mr. Kastelic, is what is
8 your residence address?

9 MR. FREEDMAN: You may answer.

10 A 4207 Cohasset Lane, Allison Park, Pennsyl-
11 vania 15101.

12 Q What's your present occupation, Mr. Kastelic?

13 A Present occupation is executive vice
14 president and chief financial officer, Equimark Corporation.

15 Q And do you have any other job titles?

16 A Yes. I am also secretary to the board of
17 directors. Treasurer. All of these titles of Equimark
18 Corporation.

19 MR. FREEDMAN: I assume your
20 question is restricted now to Equimark Corporation,
21 you are not asking for job titles for other
22 entities that he may in some way be associated?

23 MR. BURNS: I hate to have misled
24 you, but I thought the question was broad enough
25 to find out all job titles he may presently have.

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PHONE: 349-5760

1
2 MR. FREEDMAN: Maybe if that's the
3 question, I don't want the witness to be misled.
4 That's why my concern.

5 MR. BURNS: I appreciate that.

6 Q Do you have any other job titles, Mr.
7 Kastelic?

8 A Yes. I am president of Nottingham Corpora-
9 tion. I am treasurer of Equimark Commercial Finance Com-
10 pany. I am president of Beaver County Insurance Agency.
11 President of Nottingham Financial Company. Those are
12 my officer capacities.

13 Q Do you have any job titles which are not
14 officer capacities?

15 A No.

16 Q What is the company called Nottingham
17 Financial Company, did you mention that twice or
18 are there two different Nottinghams?

19 A There is a Nottingham Corporation, which
20 is a holding company, which has subsidiaries which are
21 Beaver County Insurance Agency, Nottingham Financial
22 Corporation and I believe also Community Service Life
23 Insurance Company is a subsidiary.

24 Q What is Nottingham Corporation?

25 A It is a holding company.

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Q What is Beaver County Insurance?

A It is an insurance agency.

Q And what is Nottingham Financial Company?

A Present time it is a dormant corporation.

Q And the other company you mentioned?

A Community Service Life Insurance Company.

It is a life insurance company.

Q An underwriter?

A They reinsure the credit life insurance on instalment loans at the bank.

Q Does Equimark or any of its subsidiaries have any interest in Nottingham Corporation or any of that corporation's subsidiaries?

A Equimark Corporation owns 100 per cent of Nottingham Corporation.

Q Now, what is Equimark Commercial Finance Corporation?

A Equimark Commercial Finance Corporation finances accounts receivables and inventory financing for companies.

Q And who owns that company?

A It is 100 per cent owned by Equimark Corporation.

Q And what is Equimark Corporation?

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15 PARK ROW, N.Y. 10038

PHONE 349-5790

1
2 A Equimark Corporation is a bank holding
3 company.

4 Q And does it own other subsidiaries?

5 A Yes.

6 Q Could you name them, please?

7 A Yes. Equimark Corporation owns Equibank, NA.
8 Lombard-Wall, Inc. of New York City. Nottingham Corpora-
9 tion which we mentioned. Equimark Commercial Finance
10 Company.

11 Q And what is Equibank, NA?

12 A Equibank is a national bank.

13 Q And what is Lombard-Wall, Inc.?

14 A Lombard-Wall is a dealer in short-term
15 securities. Short-term government securities. Primarily.

16 Q Could you describe your personal employment
17 background?

18 A You mean a resume?

19 Q Just the high points, yes.

20 A Well, I graduated from the University of
21 Illinois, 1956. And upon graduation went to work with
22 Price, Waterhouse & Company, certified public accounting
23 firm in St. Louis. I was in their employ until, let's see-
24 1963, less two years that I spent with the Army in
25 Germany, '57 to '59 was spent in Heidelberg, Germany.

When I left Price, Waterhouse I was employed by National Rejectors Corporation which is a subsidiary of Universal Match Corporation for about one year, in the capacity as manager of auditing and cost accounting.

In approximately September of 1973 I was employed by Mercantile Bank Corporation of St. Louis, Missouri. I eventually became vice president and controller of the holding company and the bank and I was with Mercantile until February of 1972, at which time I joined Equibank.

Q You had just reached the point where you joined Equibank, I believe.

A February of '72 I joined Equibank as vice president and controller and have served in various capacities at the bank and holding company up to my present position which is executive vice president and chief financial officer of both the bank and the holding company.

The other positions I previously mentioned were the subsidiaries.

Q To whom do you report?

A I report to the president.

Q Who is that?

A William E. Bierer, president of Equimark

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1 Corporation and president of Equibank.

2 Q And in that capacity have you remained
3 familiar even though you have no job title with them
4 with the affairs of Equibank?
5

6 A I am executive vice president of Equibank.

7 Q You still are?

8 A Yes.

9 Q In your capacities, have you maintained
10 a familiarity with the affairs of the Lombard-Wall, Inc.?

11 A Yes.

12 Q Did there come a time when you met a man
13 named G. Gray Garland?

14 A Yes.

15 Q And when was that?

16 MR. FREEDMAN: If you can recall.

17 A I would say probably in February of '75.

18 Q How did it come about that you met Mr.
19 Garland?

20 A At the time they were interested in becoming
21 officers of Funding Systems Corporation.

22 Q Had you ever heard of Mr. Garland before?

23 A No, I had not.

24 Q Did someone introduce you to him?

25 A Yes.

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Q Who did that?

A I believe it was a meeting in Mr. Cancelliere's office.

Q Who is Mr. Cancelliere?

A Mr. Cancelliere is chairman of the board of Equimark and Equibank.

Q And who else was present at that meeting?

A Mr. Bierer, myself, Mr. Garland, Mr. Robbison and, as I recall, Mr. Ganassi.

Q Was Mr. Cancelliere present?

A Yes.

Q Did anybody advise you in advance that that meeting was going to take place?

A I would assume they called me and told me to attend that meeting, yes.

Q Who did that?

MR. FREEDMAN: Do you recall whether somebody specifically told you about that meeting before the meeting?

A Not exactly. No. I just assumed they would have. Normally I am contacted before a meeting to make sure that I am available.

Q But you don't remember being contacted about this meeting?

1 A Not exactly, no.

2 Q Do you remember having any discussion of
3 the purpose of this meeting, this first meeting with Mr.
4 Garland prior to the meeting?
5

6 A No.

7 Q Do you recall whether when you arrived at
8 the meeting with Mr. Garland you knew what the meeting
9 was going to be about?

10 A Not specifically, no.

11 Q Generally do you recall having any idea as
12 to what the meeting was going to be about prior to coming
13 to the meeting?

14 A No.

15 Q You didn't discuss it in advance with Mr.
16 Bierer?

17 A No.

18 Q Did you discuss it in advance with Mr.
19 Cancelliere?

20 MR. FREEDMAN: I--

21 A No.

22 MR. FREEDMAN: I believe the witness
23 testified there was no discussion about what the
24 meeting was about.

25 MR. BURNS: He said he wasn't

1
2 sure and I'm trying to refresh his recollection.

3 Q Did you have any discussion prior to the
4 meeting with Mr. Robbison?

5 A Yes, that's right.

6 Q Would you describe what happened at that
7 meeting with Mr. Garland and in the course of it, if you
8 can, to the best of your recollection, would you tell
9 us what each person at that meeting said?

10 A I don't think I can recall what each person
11 said at the meeting. It was a general meeting where we
12 met the individuals and talked about their background
13 and their accomplishments and what they were able to do
14 and the companies that they previously acquired.

15 Q To the best of your recollection, what
16 did they say about that?

17 A That they were very successful in managing
18 companies and--

19 Q Did they mention any companies that they
20 had managed?

21 A Yes, I think they did.

22 MR. FREEDMAN: Let me just say
23 for the record, that I am happy to have inquiry
24 in whatever areas are relevant to this issue that
25 we are dealing with today. I am not really sure

1
2 how a meeting that you have not tied into that
3 issue at this point, how the agenda of that meeting
4 becomes germane, and maybe you can tell me, to
5 remove whatever reservations I have.

6 MR.BURNS: I'm going to be interro-
7 gating about every connection between Messrs.
8 Ganassi and Garland with Equimark. Or any of
9 its subsidiaries. And I am also going to be
10 interrogating about the relationships between
11 any corporations in which either Mr. Garland or
12 Mr. Ganassi may have or had had a substantial
13 interest and in Equimark or any of its subsidiaries
14 essentially to see what the relations are between
15 Messrs. Ganassi and Garland and Equimark.

16 MR. FREEDMAN: Well, we are
17 operating under an assumption, I assume. At least
18 my assumption, that the court's order says that
19 it is concerned with the validity of the sale of
20 stock in April of 1975 to Messrs. Garland and
21 Ganassi. And that within that framework I would
22 certainly be willing to allow you a certain amount
23 of latitude. I don't really know at what point
24 that the inquiries you have outlined no longer be-
25 come relevant to that particular issue that is

1
2 set forth as being the only issue before us. And
3 there's been no testimony at this point that this
4 meeting in the latter part of February, which Mr.
5 Kastelic was in attendance, had anything whatsoever
6 to do with that sale.

7 And I think maybe that would be
8 useful in terms of getting the answers that you
9 are seeking. That you have a right to seek.
10 I would hope that you would not go terribly far
11 afield in the interest of expediting the deposi-
12 tion.

13 MR. BURNS: I'm interested in
14 finding out the relations between Messrs. Garland
15 and Ganassi and Equimark to determine what
16 controls Equimark may have over these two people
17 who took over the stock, because I don't
18 interpret Judge Carter's decision as requiring
19 me just to ask Mr. Kastelic whether the sale was
20 valid. I think the issues before the court and
21 which Judge Carter has at least recognized in the
22 course of our pleadings with him, is whether
23 Equimark has retained any control over the
24 majority shares of Funding Systems Corporation
25 which were sold to Messrs. Garland and Ganassi

and I would assume that I am permitted to inquire as to these relations to determine what the nature of that control may be.

MR. WALDMAN: If I may interject, perhaps rather than having a philosophic discourse, we might just find out whether this meeting had anything to do with the sale and then if we have an objection we can make an objection. Do you think we can do that?

BY MR. BURNS:

Q What topics were discussed at this first meeting with--between you and Mr. Garland?

MR. FREEDMAN: And the other people who Mr. Kastelic has testified were there.

A It was a general discussion really of getting to meet these people and talk to them. At no time did we discuss the sale of Funding Systems at that meeting.

Q And were you there for the entire meeting?

A Yes, I was.

Q Now, what did Mr. Garland or Mr. Ganassi say about other companies that they had managed?

MR. WALDMAN: I am going to object to that. I cannot direct the witness not to answer.

MR. BURNS: I know you cannot.

MR. WALDMAN: Therefore I would not try to. But if there was any discussion of the sale, I don't see what it has to do with the subject of this examination.

MR. FREEDMAN: I would concur in the objection, if necessary instruct the witness not to answer.

MR. BURNS: Are you so instructing him?

MR. FREEDMAN: I said if necessary I would.

MR. BURNS: I have asked the question.

MR. FREEDMAN: Then I would instruct him not to answer for the same reason.

Q Mr. Kastelic, did you hear your counsel's latest instruction not to answer?

A Yes, I did.

Q Do you intend to abide by that instruction?

A Yes, I do.

MR. FREEDMAN: Mr. Kastelic again abides by the instructions of his counsel.

Q Have you ever met Mr. Ganassi prior to the

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meeting that we just referred to?

A No.

Q Now, did you have a subsequent meeting with Mr. Garland or Mr. Ganassi? .

A During which period, what are we talking about, the subsequent meetings with them? Yes, of course.

Q When was the next meeting?

A I don't recall specific dates, but I know we did have meetings subsequent to that.

Q Do you keep a calendar which indicates when you have meetings with people?

A It is a rough indication of my meetings, yes.

Q And do you have that calendar with you today?

A No, I don't.

Q We're going to have to request that you produce it at our next meeting.

MR. FREEDMAN: There was--

Q Let me ask this: Do you have any other way to refresh your recollection as to when was your next meeting with Mr. Garland and Ganassi?

A Well, there were meetings in the latter part of February and early March.

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Q This is 1975?

A Yes.

Q And do you recall when your second meeting with either Mr. Garland or Ganassi took place?

A The exact date, no, I do not recall the exact date.

Q Perhaps we could leave a blank in the transcript and he could supply that.

MR. FREEDMAN: I generally do not like to leave spaces in transcripts. Again, if it will expedite your inquiry, in the spirit of cooperation I will allow it.

MR. BURNS: I think it is for your benefit. But I certainly think I'm entitled to that date if it is available.

MR. FREEDMAN: I'm not disputing it. I said in the spirit of cooperation I would ask the witness to provide it. I don't know how germane that date is to the issue that we have here. But if it will be of assistance to you, that will be okay.

MR. BURNS: Just so we are not confused it is not of assistance to me, because I think I would be entitled to recall the witness

1 to give the testimony. But for your benefit so
2 that he doesn't have to make another trip, I'm
3 willing to leave a blank, if you so request.
4

5 MR. FREEDMAN: I won't belabor
6 the point. I've already stated that we would
7 provide the date.

8 A

9 Q What was the topic of the second meeting
10 with Mr. Canassi and Mr. Garland, were they both present,
11 by the way?

12 A Yes.

13 Q What was discussed at that meeting?

14 A I believe at that time they were officers
15 of Funding Systems Corporation.

16 Q Do you know how they happened to become
17 officers of Funding Systems Corporation?

18 A They were elected by the board.

19 Q Were you a member of the board?

20 A Yes.

21 Q Do you know who proposed them to be
22 officers of Funding Systems Corporation?

23 A No, I don't recall which director made
24 the proposal.

25 Q Well, were you--do you recall when the

1
2 meeting of the board took place at which Messrs. Garland
3 and Ganassi were elected officers of Funding Systems
4 Corporation?

5 A I believe their appointment was February
6 the 24th.

7 Q 1975?

8 A Yes.

9 Q And did you have any discussion prior to
10 that board meeting of the fact that Messrs. Garland and
11 Ganassi would become officers of Funding Systems Corpora-
12 tion?

13 MR. FREEDMAN: If you recall any.

14 A I don't recall. No.

15 MR. FREEDMAN: Just to set the
16 record straight, if I may.

17 MR. BURNS: Sure.

18 MR. FREEDMAN: Mr. Kastelic, are
19 you clear in your recollection that there was--
20 that there was an election of Messrs. Garland and
21 Ganassi to the board?

22 MR. BURNS: Not to the board.
23 As officers.

24 MR. FREEDMAN: Oh, as officers?
25 If that's your best recollection, that's fine.

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A Certainly there was some sort of ratification I would think of their appointment by the board. Maybe it was not. I'm sure there was some sort of ratification by the board of their appointment. I don't know of any other means by which an officer of a corporation becomes an officer of a corporation.

Q Well, prior to their becoming--prior to Messrs. Garland and Ganassi becoming officers of Funding Systems Corporation, were you notified that they would become officers of Funding Systems?

A No.

Q How did it come to your attention that they became officers of Funding Systems Corporation?

A Through whatever board action we took. I as a director would have been--would have had knowledge of it at that time.

Q And you attended the meeting where that action was taken?

A I believe I did.

Q And was there any discussion at that meeting of Messrs. Garland and Ganassi becoming officers of Funding Systems Corporation?

A Yes.

Q To the best of your recollection, would you

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1
2 tell us what that discussion was saying to the best of
3 your recollection who said what?

4 A I don't recall specifically who said what,
5 but the general tone of the discussion was that these
6 gentlemen were successful in running businesses and that
7 we thought they could do a good job of running Funding
8 Systems Corporation.

9 Q Was there any discussion of any relations
10 that Messrs. Garland or Ganassi had previously with
11 Equimark or any of its subsidiaries?

12 A No.

13 Q Did anyone at that meeting indicate that
14 he had had any contact with Messrs. Garland or Ganassi
15 in any other context other than the consideration of them
16 to be officers of Funding Systems Corporation?

17 A I don't recall any discussion along those
18 lines.

19 Q Was there any discussion of whether Mr.
20 Cancelliere desired that Messrs. Garland and Ganassi
21 be made officers of Funding Systems Corporation?

22 A No.

23 Q Was there any discussion of whether Mr.
24 Bierer desired that Messrs. Garland and Ganassi become
25 officers of Funding Systems Corporation?

1
2 A I don't recall any specific comments along
3 those lines, no.

4 Q Do you recall any general comments along
5 those lines?

6 A No.

7 Q Wasn't Mr. Bierer a member of that board
8 of directors?

9 A I believe he was at that time.

10 Q And did he enter into this discussion of
11 the appointment of Messrs. Garland and Ganassi to the board
12 of Funding Systems Corporation?

13 A He may have.

14 Q Well, to the best of your recollection, did
15 he?

16 A I don't know.

17 Q Who else was present at that meeting?

18 MR. FREEDMAN: If you can recall.

19 A If I can recall--I would think Bill Holls.

20 MR. FREEDMAN: Do you know Mr.
21 Holls was there?

22 THE WITNESS: No, I don't exactly.
23 I just assume he would be there. I don't--I
24 can't really say, you know, this is over a year
ago, who was there. I know we had a quorum

1
2 and the directors were there--I guess I can't
3 specifically say who was there. I would have to
4 refer to the minutes and see who was there.

5 Q Where did the meeting take place?

6 A At Fifth and Smithfield, which is the
7 headquarters of Equibank and Equimark.

8 Q In Pittsburgh?

9 A Pittsburgh.

10 Q Do you recall anything else that was dis-
11 cussed at that particular meeting of the board of
12 directors?

13 A No.

14 Q Was any type of recording made of that
15 meeting of the board of directors of Funding Systems?

16 A No.

17 Q Was any stenographic record made of that
18 meeting?

19 A A secretary would have taken the minutes,
20 I'm sure.

21 MR. FREEDMAN: I think if I under-
22 stand the question, Mr. Burns is asking whether
23 a stenographic record similar to the one that's
24 being taken today was taken at that meeting.

25 THE WITNESS: Oh, no. No.

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Q Who was the secretary at that time?

A Harold P-e-r-n-i-s-e-k.

Q And was he present at that meeting?

MR. FREEDMAN: If you know.

A Here again, I can't just put myself back a year ago and say he was there. I would assume he was. He generally attended the meetings, as secretary.

MR. FREEDMAN: Excuse me a moment.

Q Do you recall whether Mr. Cancelliere was present at that meeting?

A No.

Q No, you don't recall?

A I don't recall.

Q Do you recall whether Mr. Robbison was present at that meeting?

A No.

Q Now, you don't recall?

A I do not recall specific individuals being there.

Q Do you recall whether either Mr. Garland or Ganassi were there?

A No.

Q Do you have anything here that would refresh your recollection?

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A No.

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Q Do you know of anything that would refresh your recollection?

5

A We are still talking about the board meeting?

6

Q The board meeting of Funding Systems, Inc.

7

8

A I would think the minutes would reflect those in attendance.

9

Q Do you know where those minutes are?

10

A Funding Systems.

11

Q You don't have a copy?

12

A No, I do not.

13

Q Does Equimark have a copy?

14

A I don't know.

15

16

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18

Q Now, you testified that after that board meeting and after they had become officers, you again met with Mr. Garland and Ganassi. And that happened some time in February of 1975, I believe.

19

A Latter part of February.

20

21

Q And was this a meeting with both of them or with one or another of them?

22

A Both of them.

23

Q Who else was present at that meeting?

24

A I don't recall.

25

Q Do you know whether Mr. Cancelliere was

1 present?

2 A No, I know he was not present.

3 Q Do you know whether Mr. Bierer was present?

4 A No, he was not present.

5 Q Do you know whether Mr. Robbison was present?

6 A I don't recall Mr. Robbison.

7 Q And what was--what topics were discussed
8 at that meeting?

9 A I think it was generally about their running
10 of the company. What they proposed to do. The general
11 operations type discussion.

12 Q Do you recall what salary was being paid to
13 Messrs. Garland and Ganassi?

14 A No, I do not.

15 MR. WALDMAN: Objection.

16 Q The only topic at that second meeting was
17 their proposals for running Funding Systems Corporation?

18 A Yes.

19 Q Could you tell us what was said on that
20 subject?

21 MR. WALDMAN: I object to that.
22 This is not the topic of this deposition, which
23 is to inquire into validity for the sale of stock.
24 If there was no discussion with respect to the
25

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2 sale of stock or matters related to it, I think it
3 is outside the scope of this examination.

4 MR. FREEDMAN: Could we have the
5 question read back, please?

6 (The record was read.)

7 MR. WALDMAN: I withdraw my objec-
8 tion. I think that may--well, I withdraw my
9 objection. Withdrawn.

10 Q You understand what the question is?

11 A Would you repeat it again, please?

12 Q Okay. The question is, what was said at
13 your second meeting with Messrs. Garland and Ganassi in
14 respect of their proposals for running and operating
15 Funding Systems Corporation?

16 A As I said before, it was just general
17 discussion, nothing that I recall specifically of any
18 great import that would have stuck in my mind. They
19 were getting ready to run the company and I'm sure that
20 they had questions, I was an officer of the company, and
21 we just were talking about the operations of Funding
22 Systems Corporation.

23 Q Do you remember anything that was said at
24 that meeting?

25 A As I recall, we discussed their expenses,

1
2 some of the credit problems that they were having with
3 some of their leases. Their collection effort, how they
4 would go about trying to collect the leases to control
5 operating expenses. Things of that nature.

6 Q And what was said about collection efforts?

7 MR. FREEDMAN: I will object at
8 this point. I don't see how the collection efforts
9 that Funding Systems was making or had made in the
10 past or intended to make in the future could
11 possibly have any bearing on the issue that we
12 are hereto talking about today. If you can give
13 me some basis for connecting that question with
14 the issue before us, I will be perfectly willing
15 to listen to it. I think if we are going to go
16 into the inquiry as to the operations of Funding
17 Systems Corporation, we'll be just getting into a
18 lot of irrelevant information on this deposition.

19 MR. BURNS: Well, I think it is
20 relevant to find out how closely Messrs. Ganassi
21 and Garland were working with Equimark at the time
22 they took over as officers.

23 MR. WALDMAN: You already have the
24 facts of the meeting and the subjects discussed.

25 MR. BURNS: Now I want to know what

1
2 was said.

3 MR. WALDMAN: I object.

4 MR. FREEDMAN: I just don't see
5 the relevance to whether or not this sale was
6 validly accomplished or not. I just don't see how
7 the operations of Funding Systems Corporation
8 possibly can be related to this. In light of the
9 judge's decision, I think that we're just going
10 afield.

11 MR. WALDMAN: Perhaps if the
12 reporter could mark the question and then as we
13 went, it might become more apparent after we have
14 gone through the transaction itself, although I
15 doubt it.

16 MR. BURNS: Mr. Freedman, I intend
17 to ask him what was said about these various
18 topics that he said were discussed at that
19 second meeting. I assume that you intend to
20 object and to instruct him not to answer that
21 series of questions, am I correct?

22 MR. FREEDMAN: If you have a
23 conceivable basis for asking those questions or
24 you have not established any conceivable basis for
25 asking those questions, considering the limitations

1 placed on this deposition by Judge Carter, it is
2 possible that I would take the same position. It
3 depends at what point that you link up these
4 questions with the issue that's before the court.
5 If you link it up, then I would certainly recon-
6 sider any position that I have taken. I am not
7 committed to any position until I hear your ques-
8 tions.
9

10 MR. BURNS: Well--

11 MR. FREEDMAN: We've been here now
12 approximately an hour, and we have yet to get to
13 the question which the court proposed, which is
14 what occurred during this transaction in April
15 1975 and whether the transaction was in all
16 respects a valid one and I'm perfectly willing to
17 have the witness testify to that and he is
18 here for that purpose. We have gone through
19 essentially an hour of background and which I
20 have not--

21 MR. BURNS: Let me interject, Mr.
22 Freedman. I think we have essentially gone
23 through an hour which comprised approximately a half
24 an hour to 40 minutes of your interruptions.

25 MR. FREEDMAN: I think the record

1 will speak for itself on that point.

2
3 MR. BURNS: I think it will speak
4 to that question for sure. Are you instructing
5 him not to answer my question about what was said
6 about collection efforts?

7 MR. FREEDMAN: I am.

8 Q Have you heard your counsel's instruction,
9 Mr. Kastelic?

10 A Yes.

11 Q Do you intend to abide by it?

12 A Yes.

13 MR. FREEDMAN: Mr. Kastelic abides
14 by all of his counsel's instructions.

15 MR. WALDMAN: Off the record.

16 (Discussion off the record.)

17 Q Mr. Kastelic, can you tell us what was
18 said at that second meeting with Messrs. Garland and Ganassi
19 about the subject of credit problems?

20 MR. FREEDMAN: I'm sorry, I object
21 again.

22 MR. BURNS: You instruct the
23 witness not to answer?

24 MR. FREEDMAN: Yes.

25 BY MR. BURNS:

1
2 Q Mr. Kastelic, did you hear your counsel's
3 instructions?

4 A Yes.

5 Q Do you intend to abide by it?

6 A Yes.

7 MR. FREEDMAN: Again, let me say
8 that Mr. Kastelic abides by all his counsel's
9 instructions.

10 Q Could you tell us what was said at that
11 second meeting, Mr. Kastelic, between--I'm sorry, with
12 Messrs. Garland and Ganassi about the control of the
13 operating expenses of Funding Systems Corporation?

14 MR. FREEDMAN: I object again.

15 MR. BURNS: Do you instruct the
16 witness not to answer?

17 MR. FREEDMAN: I do.

18 Q Mr. Kastelic, have you heard your counsel's
19 latest instruction?

20 A Yes.

21 Q And do you intend to abide by it?

22 A Yes.

23 MR. FREEDMAN: Again let me say
24 that Mr. Kastelic abides by his counsel's instruc-
25 tions but I would again say for the record that

1
2 if you can connect these questions with the issue
3 that's before the court I'll be happy to reconsider
4 my position.

5 MR. BURNS: Well, I think I have
6 connected it, because we're concerned with how
7 much control and patterns of control which Equimark
8 may have exercised over Messrs. Ganassi's and
9 Garland's management of Funding Systems Corporation.

10 Q Now, did there come a time when you had a
11 third meeting at which either Mr. Garland or Ganassi
12 or both of them were present?

13 A Yes.

14 Q When did that occur?

15 A Early March.

16 Q Of 1975?

17 A 1975.

18 Q And where did that occur?

19 A My office.

20 Q And who was present?

21 A Mr. Garland, Ganassi and myself. I can't
22 recall, there may have--someone may have been in and
23 out during our discussions. Gary Pote and so on. I
24 don't recall specifically.

25 Q And did you complete your answer?

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A Yes.

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Q What was the subject of that meeting?

4

A I think we discussed the possible sale of Equimark's interest in Funding Systems.

6

Q What was said about that?

7

A They inquired if we would be interested in selling.

8

9

Q And what did you say?

10

A Definitely we would be.

11

Q And was there any discussion about any of the possible terms of a possible sale?

12

13

MR. FREEDMAN: Could you perhaps define a little bit what you mean by terms of the sale, so that the witness is clear?

14

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MR. BURNS: The circumstances under which the sale would take place, who would-- what would be done about debts, what would be done about price of stock, how it would be transferred, anything relating to the mechanics of the sale.

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A I don't think at that meeting we specifically talked about price or specific conditions. I think it was sort of an exploratory meeting where they were inquiring of me as to whether we would really be interested

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2 in disposing of our interest in Funding Systems. And I
3 said that I would, that I was interested in disposing of
4 Funding Systems and that I had been given this charge by
5 management to sell Funding Systems and I would be
6 interested to talk to them or anyone else that would be
7 interested in acquiring Funding Systems.

8 Q How long did this meeting take?

9 A I would say less than an hour.

10 Q Was it more than half an hour?

11 A Yes.

12 Q Could you elaborate a little more fully
13 on what was said in that meeting?

14 A Well, to the best of my recollection,
15 they asked whether, as I indicated before, whether we
16 would be interested in selling our position, and I said
17 yes we would. I believe we talked about would Equimark
18 continue to provide the funding that it had in the past,
19 I said I assume we would have to continue to furnish them
20 financing. That was generally the most important area
21 we covered.

22 Q What I'm getting at, because I think the
23 details of this meeting are very significant, Mr. Kastelic,
24 is that I say it took over half an hour and you summarized
25 it in about two minutes and could you tell us a little

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bit more about what each side said to the other.

A I can't quote specifically. I'm sure we talked, when you sit down and someone asks you, you know, would you be interested in selling a company, you say yes--talked about generally the type of transaction, would we want to sell the stock, would we want to sell the purchase of assets.

Q What was said about that?

MR. FREEDMAN: If anything.

A I expressed a desire that it was Equimark's intention to sell the stock of Funding Systems Corporation. That is the type of sale that we wanted.

Q Did you indicate any reason why Equimark wanted to sell the stock of Funding Systems?

A Yes.

Q What did you say about that?

A Said that in the long range interests of Equimark and its stockholders, I felt that it would be best if we divested ourselves of Funding Systems Corporation.

Q Did you say why?

A Yes. I said that Equimark was--had taken a direction of you might say restricting some of its non-banking activities, and intended to concentrate more on its

1
2 primary business, that of banking.

3 Q Did you indicate why this decision had been
4 made?

5 A Yes. That this was Equimark's objective
6 in going forward was to concentrate more in just the
7 banking business, rather than the non-banking subsidiaries.

8 Q Did you indicate why Equimark had made that
9 decision to concentrate more in banking?

10 A Yes.

11 Q What did you say about that?

12 A I said that Equimark's capital position
13 was such that we could not be as large as other financial
14 institutions in the non-banking industry; that we should
15 employ our capital more in the banking end of the busi-
16 ness.

17 Q What did Messrs Garland and Ganassi respond
18 to this statement, if they did?

19 A I don't know that they specifically
20 responded to that statement. That happened to be Equi-
21 mark's position, which I was explaining to them. I don't
22 think it really was pertinent as far as they were con-
23 cerned. That was our decision as the management of Equi-
24 mark.

25 Q I believe you said that, I think I got your

1
2 language accurately. That you "had been given this charge
3 by management to sell Funding Systems"?

4 A Yes.

5 Q When did that take place?

6 A I don't recall specifically. I would say
7 some time in 1974.

8 Q And could you tell us what was said to you
9 and what you said and who said it in respect to that
10 subject?

11 A Yes, it was one of our executive meetings
12 with the executive officers as we were talking about long-
13 range plans and objectives of the Equipark Corporation.
14 That's when we arrived at and jointly agreed that Equipark
15 should concentrate more in the banking end of the business.
16 And as a result, this meant that there were non-banking
17 subsidiaries which we should divest ourselves of. As you
18 have seen in our annual report, we sold Atlantic Manage-
19 ment Corporation, which was our Consumer Finance subsidiary,
20 and subsequently we sold Funding Systems Corporation, which
21 was in keeping with this objective which management
22 established. As chief financial officer it
23 was my responsibility to dispose of these subsidiaries.

24 Q Wasn't the disposition of Atlantic Manage-
25 ment in connection with, what I guess was then a Department

1 of Justice investigation which led to an indictment entitled
2 "United States of America versus Equimark Corporation,
3 Criminal No. N-75-0477 in the United States District Court
4 for the District of Maryland."
5

6 A No.

7 Q It had nothing to do with that?

8 A No.

9 Q Who told you that you should take steps to
10 sell Funding Systems Corporation?

11 A Mr. Bierer, Mr. Cancelliere at this meeting
12 I'm sure mentioned that.

13 Q And what steps did you take to sell Funding
14 Systems?

15 A We talked to a number of parties.

16 Q To whom did you talk?

17 A I can recall one meeting we talked to our
18 a ting firm, Price, Waterhouse & Company. Asked them
19 if they were aware of any companies that were in the market.
20 I think we were approached by other parties that I don't
21 recall specific names.

22 Q Do you recall a company called Colonial, I
23 believe, Investment--Colonial Commercial Corporation?

24 A I am not sure--

25 MR. FREEDMAN: In what regard?

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2 MR. FREEDMAN: In what regard?

3 MR. BURNS: In the reference to
4 the possibility of selling Funding Systems Corpora-
5 tion.

6 A Is this firm in Philadelphia?

7 A I am not--

8 Q It is in Long Island, I believe.

9 A Long Island? I don't specifically recall
10 the name.

11 Q Did you discuss the possibility of selling
12 Funding Systems Corporation with Marion Sprague?

13 A I don't specifically recall. No.

14 Q Did you discuss the possibility of selling
15 Funding Systems Corporation with Charles R. Heller,
16 H-e-l-l-e-r?

17 A I did not.

18 Q Do you know of anyone who did?

19 A No. I don't recall being advised of that.

20 Q Did you discuss a possible sale of Funding
21 Systems Corporation with anyone from Salomon Brothers?

22 A Yes. I believe we did mention it to
23 Salomon Brothers.

24 Q And who did you mention it to at Salomon
25 Brothers?

1
2 A A specific name I can't recall now. It
3 was one of their representatives in their Corporate
4 Finance Department.

5 Q Do you recall when this discussion took
6 place?

7 A I would have to guess. 1974.

8 Q What part of 1974?

9 A Middle.

10 MR. WALDMAN: I object to the witness
11 guessing as testimony.

12 MR. FREEDMAN: I'll allow him to
13 answer. I think the witness is really trying to
14 give you his best recollection.

15 MR. BURNS: Right.

16 MR. FREEDMAN: If the record is
17 clear that it is his best recollection and not a
18 specific recollection of the time, I have no objec-
19 tion.

20 MR. BURNS: I'm not trying to trick
21 him as to dates.

22 MR. WALDMAN: I just want to make
23 clear that the witness should be clear as to the
24 difference between giving an answer that is an
25 assumption and giving an answer that is a best

recollection. Best recollection is proper testimony. Assumption is not.

Q There is a question pending. What part of 1974 did you have the discussion with Salomon Brothers?

MR. FREEDMAN: If you can recall.

A I can't recall.

Q Was it towards the beginning of the year, towards the end of the year, towards the middle of the year?

MR. FREEDMAN: If you can recall.

A I can't specifically recall.

Q Well, to the best of your recollection, what was said in the course of this discussion with Salomon Brothers about the possibility of selling Funding Systems?

A I would refer to my previous comment. We made the same statement to investment bankers or analysts or anyone who talked to me that it was our intention to concentrate in the banking business and as a result we had taken a hard look at our non-banking subsidiaries and decided that we would divest ourselves of these.

Q Of Funding Systems?

A Of some of our non-banking subsidiaries, including Funding Systems.

Q When was the first time you made a statement

1 to that effect to someone who is not an employee or officer
2 or lawyer for Equimark, or its subsidiaries?
3

4 MR. FREEDMAN: Again, if you can
5 recall.

6 A I can't recall specifically when we first
7 made that statement externally.

8 Q Was it in 1974?

9 A Yes.

10 Q To whom was it made?

11 A To our management group. And also to
12 Salomon Brothers. We told them that in 1974.

13 Q Did you tell it to anyone else?

14 MR. FREEDMAN: When?

15 Q In 1974.

16 A Yes. Merrill Lynch.

17 Q To the best of your recollection, when in
18 1974 did you say that to Merrill Lynch?

19 A I don't recall specifically.

20 Q To whom at Merrill Lynch did you make that
21 statement?

22 A Their bank stock analyst.

23 Q Who is that?

24 A Martha Reed. Frank Barkosy.

25 Q Could you give us spellings?

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A Martha R-e-e-d. Frank B-a-r-k-o-s-y.

Q And what did you say to Martha Reed and Frank Barkosy?

A The same statement I made previously, that Equimark Corporation was going to concentrate in the banking industry and as a result would be interested in selling some of its subsidiaries.

Q Do you recall that Equimark made a tender offer for the outstanding shares of Funding Systems Corporation?

A Yes.

Q And do you recall whether these statements were made before or after the tender offer?

A I am not sure. Probably--I don't know.

Q Do you know whether these statements were made before April of 1974 to anyone outside of Equimark?

MR. WALDMAN: I'm going to object.
What is the relevance of this have to a sale of stock that was made April of 1975?

MR. BURNS: I'm curious about what efforts were made to sell Funding Systems. How any comparable or how any other opportunities compared with the transaction which was actually consummated to determine whether or not there is

1
2 any reason to believe that for some consideration
3 which we don't know about, Messrs. Ganassi and
4 Garland may have received more favorable terms.

5 MR. WALDMAN: But your question
6 has nothing to do with that, even assuming that
7 were relevant. So far the only thing we have had
8 testimony of is that two investment banking houses
9 were informed that Equimark was interested in
10 divesting itself of all of its subsidiaries.

11 MR. FREEDMAN: Non-banking.

12 MR. BURNS: Some, not all.

13 MR. WALDMAN: Some of it is non-
14 banking subsidiaries. When and if we get to a
15 transaction, or even something, approach someone
16 or a response, that might or might not be
17 appropriate to go into the details.

18 Q Did anyone show any interest in purchasing
19 Equimark's shares of Funding Systems Corporation stock?

20 MR. FREEDMAN: In 1974?

21 MR. BURNS: 1974.

22 MR. FREEDMAN: Maybe the--there is
23 a little confusion here, because the phrase "Show
24 any interest" is a little bit vague. Perhaps you
25 could rephrase that to help the witness.

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2 Q Did anyone indicate to you or did anyone
3 else at Equimark that they would be interested in dis-
4 cussing the possible purchase of the Funding Systems
5 stock held by Equimark?

6 MR. FREEDMAN: I think the witness
7 can testify as to anyone indicating an interest
8 to him.

9 MR. BURNS: Or anyone reporting to
10 him.

11 A There were parties, I believe, that--I
12 don't recall specifically the names of them. There were
13 from time to time inquiries that came in.

14 MR. FREEDMAN: I don't believe that
15 was the question. The question was whether anybody
16 showed any specific interest in purchasing Equi-
17 mark stock in Funding Systems in the year 1974.
18 I assume by that question, you mean more than
19 just idle questions are the shares for sale. I
20 assume you mean something that goes beyond the
21 idle question, am I correct, Mr. Burns?

22 MR. BURNS: I'm not so sure. How
23 do you know it is idle?

24 MR. FREEDMAN: If it is just the
25 question followed by nothing else, I would

1
2 assume it is an idle question. If the question
3 led to some negotiation of some kind that's a
4 different story. I don't know if there is a
5 question pending.

6 MR. BURNS: I don't think there
7 is.

8 Q To the best of your recollection, who in
9 1974 indicated any interest in possibly purchasing the
10 stock of Funding Systems held by Equimark?

11 A I don't recall specific names or companies.

12 Q Did you have any direct dealings with any
13 individuals in respect of that subject matter in 1974?

14 A If anyone had an interest, they would have
15 talked to me about it, yes.

16 Q And there were some people who did talk to
17 you?

18 A I believe there were.

19 Q You don't recall?

20 A I don't recall specifically, no.

21 Q Did Equimark--

22 MR. FREEDMAN: Are we clear as I
23 understand the witness' testimony, that he said
24 there were inquiries concerning the possible
25 sale, are we clear that that's the extent of the

1
2 contact that took place in 1974.

3 MR. BURNS: He said he had some
4 discussions with these people.

5 MR. WALDMAN: Perhaps we could
6 clarify that.

7 Q Would you tell us, to the best of your
8 recollection, what was said in the course of these
9 discussions about the possibility of selling Funding
10 Systems stock that was held by Equimark?

11 A They were general in nature, as would we
12 be interested in selling our interest, did we want to
13 sell our stock, all of our stock, did we want to maintain
14 any ownership. Nothing very definitive that I could re-
15 call.

16 Q In 1974 did anyone make any offer in terms
17 of price per share or total price that they might be
18 willing to pay for the stock?

19 A No.

20 Q During 1974 had Equimark's management
21 determined any price or price range for the stock which--
22 of Funding Systems Corporation, which they would deem an
23 acceptable selling price?

24 A We certainly were aware of the market book
25 on the price and we knew the range of the price fluctuated

1
2 widely. We were aware that there was very little
3 activity in the stock and that the opportunity to sell a
4 block as large as ours, was very limited.

5 Q But had you made any determination as to
6 what price would be acceptable for the stock?

7 MR. FREEDMAN: You mean Mr.

8 Kastelic personally?

9 MR. BURNS: Equimark.

10 A I think we had discussed the market price
11 range as being what a going price of the stock would be.

12 Q And when did you have that discussion, or
13 did you have more than one discussion?

14 A Probably--

15 MR. FREEDMAN: If you recall.

16 A More than one discussion.

17 Q With whom did you have these discussions?

18 A With various people from time to time. Gary
19 Pote, Bill Bierer, Bill Holls, myself, I talked to myself.

20 Q Did you ever discuss this topic with Mr.
21 Cancelliere in 1974?

22 A Yes. Mr. Cancelliere. I think we even
23 dsicussed it with Salomon Brothers.

24 Q Did Mr. Cancelliere ever suggest a price
25 that you ought to seek for this stock?

1
2 A No. I think he relied on me as chief
3 financial officer to obtain the best price available to
4 the Equimark Corporation.

5 Q Did anyone else ever discuss what would be
6 a good price for the stock?

7 MR. FREEDMAN: At Equimark?

8 MR. BURNS: At Equimark.

9 MR. FREEDMAN: With Mr. Kastelic, I
10 assume.

11 MR. BURNS: Yes.

12 A None that I recall.

13 MR. BURNS: Can we have this
14 document which is a letter on the letterhead of
15 Marion W. Sprague, dated September 24, 1973, addressed
16 to "Dear Gary," apparently Gary L. Pote, marked as
17 Plaintiff's Exhibit 1 for identification.

18 (Letter on the letterhead of
19 Marion W. Sprague, dated
20 September 24, 1973 addressed
21 to "Dear Gary," marked
22 Plaintiff's Exhibit 1 for
23 identification, as of this
24 date.)

22 MR. BURNS: And this letter which
23 is a Xerox copy, the other was a Xerox copy too,
24 of a letter on the letterhead of Marion W.
25 Sprague addressed to M. A. Cancelliere, and dated

December 13, 1973, marked Plaintiff's Exhibit 2 for identification.

(Xerox copy of letter on the letterhead of Marion W. Sprague addressed to M. A. Cancelliere, dated December 13, 1973, marked Plaintiff's Exhibit 2 for identification, as of this date.)

(Short recess taken.)

Q I show you Plaintiff's Exhibits 1 and 2 for identification, Mr. Kastelic, and ask you whether you have ever seen those documents.

MR. FREEDMAN: You mean the original?

MR. BURNS: The originals or copies of them, I don't care.

A Yes.

Q When did you see them?

A I don't recall specifically.

Q What's your best guess?

MR. FREEDMAN: I would rather he not guess.

MR. BURNS: It takes longer. I thought we were trying to save time.

MR. FREEDMAN: I am. I don't want him to guess.

Q Was it 1974?

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A I can't say specifically.

Q Well, was it in 1973?

A There again, I cannot pinpoint the exact time. I don't know. I don't remember.

Q Could it have been as late as 1975 that you first saw those documents?

A No.

Q How did you happen to see Plaintiff's Exhibits 1 and 2 for identification?

A Copies, I was furnished copies of them.

Q Who gave them to you?

MR. FREEDMAN: If you recall who gave them to you.

A I don't recall.

Q When they were given to you, was anything said to you about them?

A I can't recall.

Q Did you contact Mr. Sprague or Colonial Commercial Corporation in respect of a possible sale of Funding Systems stock?

A No, I did not.

Q Did you direct anyone to?

A No.

Q Did anyone at Equimark indicate to you that

1
2 they had made any contact with Mr. Sprague or Colonial
3 Commercial Corporation in respect of the possible sale
4 of the Funding Systems stock?

5 A No. I can't recall specifically discussing
6 this.

7 Q Once you had made the decision to sell
8 Funding Systems Corporation stock, didn't it occur to you
9 that you might be able to sell it either through Sprague
10 or Colonial?

11 A As I said before, we had a number of inquiries
12 that came in. But nothing really definitive ever developed
13 on any of these inquiries.

14 Q Well, was there any follow-up to see whether
15 this stock could be sold through either Mr. Sprague or
16 Colonial?

17 MR. FREEDMAN: Are you referring now
18 to 1975?

19 Q Any time after receipt of Plaintiff's Exhibits
20 1 and 2.

21 A I did not contact Colonial or Mr. Sprague.

22 Q Well, did you check around to see whether
23 anyone at Equimark had done so?

24 A As I recall, I did discuss with Gary Pote
25 who was the treasurer at the time of Equimark Corporation,

1 from time to time if any inquiries had come to him
2 directly as treasurer to keep me advised of any inquiries.
3 And it is along those lines that these letters came to my
4 attention. But I don't recall specifically when.
5

6 Q But you never checked to see whether or not
7 it would be possible to sell the stock either through Mr.
8 Sprague or through Colonial?

9 A I did not.

10 MR. FREEDMAN: There is an inference
11 in the question that he had some obligation to
12 check that.

13 MR. BURNS: I'm not saying whether
14 he has an obligation or not.

15 MR. FREEDMAN: Let me just finish,
16 if I may. He's testified that in 1974 he was
17 given some responsibility in terms of looking for
18 a purchaser of Funding Systems shares owned by
19 Equimark Corporation, and there's been no testimony
20 to indicate that Mr. Kastelic had any reason to
21 pursue this at that time.

22 Q Well, if I had an offer that--an apparent
23 offer that dated back to November of '73, I think I would
24 be inclined to see if it was still a possibility. I'm just
25 curious whether he did make an effort to find out whether

1
2 this was a possibility of a real sale.

3 A I appreciate what you might have done in
4 similar circumstances. I think we should find out what he
5 did.

6 MR. BURNS: That's what I've been
7 asking and I don't get an answer.

8 A I previously stated that I did not contact
9 Marion Sprague nor did I contact Colonial Commercial
10 Corporation.

11 Q Well, but my question went further than
12 that. Did you--did anyone at Equimark ever contact
13 Marion Sprague or Colonial Commercial in respect of the
14 possible sale of the Funding Systems stock?

15 A When?

16 Q At any time that you know of.

17 MR. FREEDMAN: Are you referring to
18 any contacts which may be set forth in the
19 correspondence itself or are you referring to
20 contacts which took place subsequent to the
21 correspondence?

22 MR. BURNS: Subsequent.

23 MR. FREEDMAN: May the witness look
24 at these again?

25 MR. BURNS: Sure.

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2 A All I can state is that I was not involved
3 directly with any negotiations, in any nature, with Marion
4 Sprague or the company mentioned in these exhibits.

5 Q Did anyone at Equimark ever advise you that
6 they had been involved in any direct negotiations with
7 Marion Sprague or with Colonial Commercial?

8 A Yes, I can recall Gary Pote mentioning to
9 me that Marion Sprague might be interested in acquiring
10 the shares.

11 Q And when did Mr. Pote mention that to you?

12 A I don't recall the date.

13 Q Could it have been as late as 1975?

14 A No.

15 Q Could it have been as late as 1974?

16 A As I said before, I don't recall the specific
17 date.

18 Q Did anyone indicate to you that they had
19 contacted Marion Sprague or Colonial Commercial in respect
20 of a possible sale of the stock of Funding Systems?

21 MR. FREEDMAN: When?

22 Q At any time.

23 A Well, as I said before, I do recall Gary
24 Pote mentioning to me that Marion Sprague was interested.

25 Q Yes, but what I want to know now is whether

1 anyone indicated to you that they had contacted Marion
2 Sprague or Colonial Commercial in respect of a possible
3 sale of the stock?
4

5 MR. FREEDMAN: If you recall.

6 A I don't recall.

7 Q Do you have anything, either here or in your
8 possession back at your office which would indicate whether
9 or not anything had been said to you, indicating that
10 someone from Equimark had contacted Mr. Sprague or Colonial
11 Commercial with respect to such a sale?

12 A No.

13 Q Did you know Marion Sprague?

14 A I had met him as a director of Funding
15 Systems at one point.

16 Q And during what period of time was he
17 a director of Funding Systems?

18 A I don't recall the dates.

19 Q Well, was he a director in 1974?

20 A I can't recall.

21 Q Do you recall whether he was a director
22 at the time Messrs. Garland and Ganassi were elected
23 officers of Funding Systems?

24 A I don't recall.

25 Q After you had that third meeting with Messrs.

1
2 Garland and Ganassi where you explored the possibility
3 of selling your interest in Funding Systems stock, did
4 you talk to anyone at Equimark about the proposal?

5 MR. FREEDMAN: Could you read that
6 back, please?

7 (The question was read.)

8 MR. WALDMAN: Objection as to
9 form.

10 A Yes.

11 Q With whom did you talk?

12 A From time to time I talked to Mr. Pote, Mr.
13 Holls, Mr. Bierer, Mr. Cancelliere, and other individuals
14 within the bank.

15 Q And this is taking the period immediately
16 after that meeting with Messrs. Ganassi and Garland,
17 and the time before you had your next meeting with them--

18 MR. FREEDMAN: Assuming there was
19 a next meeting.

20 Q Assuming there was a next meeting. I assume
21 there was, wasn't there?

22 A Yes.

23 Q And if you find this objectionable, I'll
24 go at it piece by piece, but I'm trying to save time.
25 Could you tell us what you said to each of these

1
2 individuals and what they said to you, try to fix the
3 times, to the best of your recollection?

4 MR. FREEDMAN: I will object to the
5 form of the question. But again in the interest
6 of saving time if the witness can answer the
7 question as posed, I'll allow him to answer it.
8 If you have any specific recollection of any
9 specific conversations that you had with any of
10 the gentlemen to whom you referred in your pre-
11 vious answer.

12 A Yes. I discussed it with Mr. Pote, Mr.
13 Cancelliere, Mr. Bierer, that I recall specifically,
14 advising them that Messrs. Garland and Ganassi had
15 indicated an interest in buying the company; that in my
16 opinion there was a sincere offer; and that in my judgment
17 I felt that we should pursue the matter further.

18 Q Did you discuss pricing at that time?

19 MR. FREEDMAN: You are referring to
20 the meetings--

21 MR. BURNS: The discussions with
22 Pote, Holls, Bierer and Cancelliere.

23 MR. FREEDMAN: Which took place
24 subsequent to the meeting with Messrs. Garland
25 and Ganassi.

MR. BURNS: Yes.

A Yes.

Q What was said with regard to that?

A It was my recommendation that we begin negotiations at one dollar a share.

Q Was there any indication of whether that was an appropriate strategy?

A Yes, I think that they reiterated their previous directive that it was my responsibility to obtain the best price that I could for the sale of our interests. That was the general tone of the discussion.

Q At that time did Funding Systems owe any money to Equimark or any of its subsidiaries?

A Yes.

Q What was the approximate amount of the debts of Funding Systems and Equimark?

A Well, I know specifically as of the end of December of '75, it was \$20,922,000. It was an amount less than that earlier in the year.

Q Could you give us an approximate ball park figure on it?

MR. FREEDMAN: I think you are really asking him to guess.

MR. BURNS: Anything that would

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refresh your recollection.

A I would have to refer back to the corporation's records.

Q Do you recall whether it was more than \$15 million?

A Yes.

Q It was?

A Yes.

Q Did Funding Systems have any debts to any other lenders at that--at the time this February-March 1974--

A Yes.

Q Who were they?

A Various banks in New York.

Q Was one of them Morgan Guaranty?

A I can't recall the specific institutions. I know they dealt with several banks in New York City.

Q Do you recall what the amount of those obligations were?

MR. FREEDMAN: I object. I think we are going a little bit afield. If you connect it up that's fine.

MR. BURNS: What we are going to find out is Equimark assumed those obligations or

1 something happened, I think.

2
3 MR. FREEDMAN: I don't know what we
4 are going to find out. That's speculation. At
5 this point you are asking questions relating to the
6 obligations of Funding. If you can connect it
7 in some way to the sale of the shares, or to the
8 price at which the shares were sold, perhaps I
9 could see the relevance of the questions. At this
10 point I don't.

11 MR. BURNS: Are you instructing
12 him not to answer?

13 MR. FREEDMAN: I'll allow him to
14 answer the question.

15 MR. BURNS: Okay.

16 MR. FREEDMAN: If we are going
17 to proceed on those lines I would appreciate
18 it if you can connect it in some way with what we
19 are dealing with here today.

20 A Would you repeat the question?

21 Q The question is, what was the amount of
22 Funding Systems' obligations to other banks in the February
23 and March 1974 period?

24 MR. WALDMAN: '75.

25 Q '75, yes.

1
2 A I can't give you specific amounts. It would
3 be a guess on my part.

4 Q Was it over \$4 million?

5 A The liabilities that Funding Systems had to
6 New York banks far exceeded \$5 million.

7 Q Did it owe some money to First Pennsylvania
8 Bank?

9 A As I said before, I can't recall at this
10 time which specific banks were lending Funding Systems
11 Corporation money.

12 Q During the period between your third and
13 fourth meetings with Messrs. Ganassi and Garland, was
14 there any discussion with anyone at Equimark about what
15 would be done about the obligations of Funding Systems
16 to Equimark and to the other banks in the event of a sale
17 of the stock of Funding Systems?

18 A Yes.

19 Q And with whom did you have these discussions?

20 A Mr. Pote, Mr. Bierer, Mr. Cancelliere,
21 those I can specifically recall. Others I'm sure I dis-
22 cussed the matter with them.

23 Q And what did you say to Mr. Cancelliere
24 and what did he say to you on that subject matter?

25 A It was my recommendation that we would

1
2 continue to provide financing the Funding Systems
3 Corporation to the extent prudent of a good business point
4 of view.

5 Q Did you discuss what would be prudent?

6 A I think the tone of our conversation was
7 that we would continue to provide them with the financing
8 that was necessary at that time.

9 Q Did you discuss what would be necessary?

10 A Not specific amounts.

11 Q And what did Mr. Cancelliere say in response
12 to your recommendation?

13 A There again, I think he referred back to
14 his general directive that I am chief financial officer
15 of the corporation and that is my responsibility. And
16 he does rely on me to make, to use my judgment in that
17 area.

18 Q And what did you say to Mr. Bierer and what
19 did he say to you on this subject matter?

20 MR. FREEDMAN: If you recall the
21 specific conversation with him.

22 A I think his comments were along the same
23 lines that you are handling the negotiations and whatever
24 you feel is necessary that we do, you have the authority
25 to do so.

1
2 Q And what did you say to Mr. Pote and what
3 did he say to you about that subject?

4 A I think Mr. Pote concurred with me.

5 Q Did you have any discussions with Mr.
6 Robbison during the period between your third and fourth
7 meeting with Messrs. Garland and Ganassi respecting the
8 possible sale of the Funding Systems stock?

9 MR. FREEDMAN: To Messrs. Garland
10 and Ganassi?

11 Q To anybody.

12 A Yes.

13 Q What did you say to him and what did he
14 say to you?

15 A I can recall discussing with him whether
16 he felt as a lending officer that these individuals,
17 Garland and Ganassi were capable of running an operation
18 like this. And in his opinion he said that he
19 thought they could do an excellent job of running this
20 corporation.

21 Q Did he indicate that he had had any
22 previous experience with Messrs. Garland or Ganassi or
23 both?

24 A Yes, I think he was aware of their prior
25 accomplishments.

1
2 Q And what did he tell you about that?

3 A Well, he said that they were fine managers
4 and once again, that he thought that they would do an
5 excellent job of running that company.

6 Q Did he give you any specific information
7 about their management abilities or management experience?

8 A No.

9 Q Now, did there come a time when you had that
10 fourth meeting with Messrs. Garland and Ganassi to
11 discuss the possible sale of the Funding Systems stock?

12 A I'm sorry, would you repeat that?

13 (The question was read.)

14 A Yes.

15 Q When did that take place?

16 A Early March.

17 Q And where did that take place?

18 A In my office.

19 Q And who else was present?

20 A Mr. Garland and Ganassi. I don't recall
21 exactly, they may have been, Mr. Pote may have come in.
22 Mr. Cancelliere may have come in and attended for part
23 of the meeting. Mr. Bierer may have attended for part
24 of the meeting. During these negotiations it was not unusual
25 that some of the other parties would have been present

1 just to keep abreast of how things were moving along.

2 Q Now, can you tell us what you said and
3 what Messrs. Garland and Ganassi said at that fourth meet-
4 ing?
5

6 A Yes. We were getting more definitive
7 as to the type of sale, the requirements that Equimark
8 would have as to the legal requirements of the sale, we
9 discussed the price. They indicated that \$1 was not
10 acceptable to them. They were well aware of the market
11 situation as we were. They were aware of the difficulties
12 of us disposing of such a large block of stock. We
13 talked about the SEC requirements from Equimark's point
14 of view. What kind of sale it would have to be. We
15 discussed timing, when would they really hope to close the
16 transaction, if we had decided to accept.

17 I explained to them that I would probably
18 take the matter to the full board of directors and advise
19 them of what action I was taking and asked for board
20 approval. That was the type of meeting that took place.

21 Q What was said about the price for the stock?

22 A Well, as I indicated before, I had mentioned
23 that I thought a dollar a share was a fair price.

24 They indicated that that was not acceptable
25 to them. And, yes--this meeting they did indicate

1
2 that they felt that 55 cents a share would be a reasonable
3 price from their point of view.

4 Q Did they say why?

5 A There again, I think we talked about
6 what could Equimark hope to get for its equity interest,
7 and like I say, we knew what the market price was running,
8 and the volume of transactions, it was quite limited.
9 The alternatives we had--I felt were very limited.

10 Q And did you so advise them?

11 A No.

12 Q What did they say about 55 cents being a
13 fair price?

14 A Well, that was their judgment.

15 Q That's all they said?

16 A Yes.

17 Q What was said about the timing of the
18 sale?

19 A Well, I stated that the timing was--that
20 Equimark was anxious to divest itself of Funding Systems
21 Corporation. And that we would like to consummate the
22 sale. Assuming we had proper documentation and proper
23 approvals, that I would like to end the negotiations as
24 soon as possible and get the sale consummated. That I
25 had been directed to do this and I wanted to get this

1
2 job out of the way so I could go on to more important
3 matters.

4 Q What did they say about that?

5 A They said they will do everything they
6 could to move things along as rapidly as possible.

7 Q Did you agree at that fourth meeting to
8 the 55 cent price?

9 A I told them at that meeting that I would
10 recommend that the management group accept that price.
11 And that I would discuss it with Mr. Cancelliere and Mr.
12 Bierer and Mr. Pote and that as I said before, we would
13 like to advise the board that the situation--and make
14 our recommendation to the full board of directors.

15 Q Was there any discussion at that fourth
16 meeting of the money's owed by Funding Systems Corporation
17 to Equimark?

18 A Yes.

19 Q What was said on that subject?

20 A They asked whether we would continue to
21 provide the financing that we were--at that time. And
22 I indicated that we were prepared to do so.

23 Q And was there any discussion of the
24 finance--the financing that had been provided by other
25 banks to Funding Systems Corporation?

1
2 A Yes. I told them that I would hope that
3 when they acquired the corporation, that they would be
4 successful in obtaining additional outside financing,
5 and hopefully reduce Equimark's financing of their opera-
6 tion.

7 Q But was there any discussion of the
8 existing financing by other banks to Funding Systems
9 Corporation?

10 MR. FREEDMAN: If you can recall.

11 A I can't recall.

12 Q Was there any response to your request
13 that--or suggestion that they reduce the Equimark loans?

14 A Yes.

15 Q What was their response?

16 A They said to the extent possible that they
17 could obtain additional financing they would attempt to
18 do so.

19 Q Was there any discussion of how Messrs.
20 Garland and Ganassi were going to finance the purchase of
21 the Funding Systems stock?

22 A Well, I did state, in previous meetings with
23 them, as well as that meeting, that under no circumstances
24 would Equimark or Equibank or any of its subsidiaries
25 provide any funds for their acquisition of this stock.

1
2 To that extent, it was discussed. And they understood
3 that perfectly.

4 Q Did you explain to them why such funding
5 would not be provided?

6 A No, I didn't go into any detailed explana-
7 tion of it. I just said our position was that we would
8 not provide any financing on the stock sale.

9 Q Did Equimark or Equibank or any subsidiary
10 of Equimark provide any financing for the purchase of the
11 Funding Systems stock?

12 A No.

13 Q As part of the loan agreement under which
14 Funding Systems had borrowed stock from Equimark, was
15 there any right to convert or to acquire, to convert
16 into stock of Funding Systems or to acquire stock of
17 Funding Systems?

18 A I don't understand. You said borrowed
19 stock?

20 Q Borrowed funds. Let's try that.

21 A Would you reread the question?

22 Q Let me try it again.

23 (The question was read.)

24 Q Under the loan agreement pursuant to which
25 Funding Systems had borrowed funds from Equimark, was

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1
2 there--were there any rights to convert into stock or
3 to acquire stock of Funding Systems?

4 A We held a convertible debenture, Equimark
5 Corporation held a convertible debenture of Funding Systems
6 Corporation, which had the right to convert into common
7 stock.

8 Q How many shares of common stock did you
9 have the right to convert into?

10 A 159,031.

11 Q And do you still have that right?

12 A No.

13 Q What happened to that right?

14 A That right was waived at the time of the
15 sale.

16 Q And was that right discussed at that fourth
17 meeting with Messrs. Ganassi and Garland?

18 A No.

19 Q Did there come a time when that right was
20 discussed with them?

21 A Yes, at the time we were drawing up the
22 legal documents.

23 Q And what was--when was this?

24 A Mid-March.

25 Q And who was present when that was discussed?

1
2 A That was discussed with me by in-house
3 counsel. Equimark's in-house counsel. They brought
4 the legal documentation in and said that they had been
5 working over the legal documents.

6 MR. FREEDMAN: I think we are
7 now getting into discussions between Mr. Kastelic
8 and his lawyers and I don't know--

9 MR. BURNS: I'm not sure the
10 privilege applies to in-house counsel.

11 MR. FREEDMAN: I think that that's
12 a--probably a subject we could debate.

13 MR. BURNS: I'm sure it is. Why
14 don't you discuss it with him off the record and
15 make a determination whether you want to let him
16 testify rather than having a debate.

17 MR. FREEDMAN: Off the record.

18 (Discussion off the record.)

19 MR. FREEDMAN: I'll allow the
20 witness to answer the question.

21 A Repeat the question, please.

22 (The record was read.)

23 A In-house counsel inquired as to what
24 position we wanted to take on this conversion right and
25 it was my opinion that we wanted to completely wash our

1
2 hands of Funding Systems Corporation. So I told him
3 that as far as I was concerned we could waive that right.
4 That it was of no value to Equimark Corporation.

5 Q Now, did you have any discussion with Mr.
6 Garland or Mr. Ganassi with the conversion privilege?

7 A No. Only with in-house counsel.

8 Q Did you have meetings with Messrs. Garland
9 and Ganassi subsequent to that fourth meeting you testi-
10 fied to respecting the sale?

11 A Perhaps some telephone conversations.

12 Q And what were the subjects of these
13 telephone conversations?

14 A The timing whether everything was proceed-
15 ing from their point of view, that to inform them that
16 I had counsel working on preparing the documents and had--
17 we would--we were anxious as I indicated before to con-
18 summate the sale, and get the matter closed.

19 Q Now, do you--did the matter actually
20 finally get closed?

21 A Yes. On April 22nd.

22 Q Were documents signed and exchanged?

23 A Yes.

24 Q Do you have copies of those documents with
25 you?

1
2 MR. FREEDMAN: Let me just respond
3 to that, if I may. There was no notice to
4 produce documents today, as you know. Nor was there
5 any subpoena to produce documents today. There
6 were documents that were furnished to all counsel
7 as well as to the court in connection with that
8 sale, those documents have been provided, I believe,
9 previously to you.

10 MR. BURNS: I don't believe
11 we have a complete set of the documents.

12 MR. FREEDMAN: Do you have some
13 basis for that belief?

14 MR. BURNS: We have a letter of
15 intent.

16 MR. FREEDMAN: You have documents
17 that were provided by me. Is there some document
18 that you believe exists other than the ones that--

19 MR. BURNS: I would hope so. All
20 I have is the letter of intent.

21 MR. FREEDMAN: That's the only
22 document that you have?

23 MR. BURNS: That is the only
24 document that I believe I have received from you.

25 MR. WALDMAN: Off the record.

(Discussion off the record.)

Q Mr. Kastelic, what documents were executed by Equibank in connection with the sale of the Funding Systems stock to Messrs. Ganassi and Garland?

A Well, as I recall, there was a cross receipt, there was a purchase document, we mentioned the letter of intent, there was an investment letter. Not being a lawyer, whatever legal documentation was required, I relied on my counsel to make sure that it was provided at this meeting and adequately signed by all the parties.

MR. BURNS: Mr. Freedman, would you undertake to produce the documents he's described and whatever other documentation that he was referring to, he can't remember what it is, but that was part of the transaction.

MR. FREEDMAN: Yes, I will. If you give me a two-minute break to dig around I'll be glad to furnish them to you.

MR. BURNS: All right.

Q Did there come a time, Mr. Kastelic, when you presented the terms of the proposed sale to the board of directors of Equimark Corporation?

A Yes.

1
2 Q And when did that occur?

3 A At our March meeting, as I recall. The
4 board authorized the chairman, the president, the
5 executive vice president to negotiate the sale of
6 Funding Systems Corporation stock, and to sign whatever
7 documentation was necessary to consummate the transaction
8 which management felt was in the best interest of the
9 corporation and its shareholders. If I recall, that was
10 in March.

11 Q Was there any discussion at that meeting of
12 the sale?

13 A I think we explained to the board at that
14 time, reiterated to the board, that it was Equimark's
15 objective to concentrate in the banking industry and
16 that divestiture of some subsidiaries would be taking
17 place. And this was in keeping with that policy, which
18 the board had been apprised of.

19 Q Was anything more said on that subject
20 matter at the board meeting?

21 A The March meeting? Not that I can recall.

22 MR. BURNS: Could we have the
23 following documents marked as Plaintiff's Exhibits
24 3? It will be a letter dated April 1, 1975
25 from Equimark Corporation to G. Gray Garland, Jr.

and Floyd R. Ganassi.

(Letter dated April 1, 1975 from Equimark Corporation to G. Gray Garland, Jr. and Floyd R. Ganassi, marked Plaintiff's Exhibit 3 for identification, as of this date.)

MR. BURNS: 4 will be a document entitled "Sale of Funding Systems Corporation Closing Agenda."

(Document entitled "Sale of Funding Systems Corporation Closing Agenda," marked Plaintiff's Exhibit 4 for identification, as of this date.)

MR. BURNS: 5 will be copies of two checks each in the amount of \$159,658.12.

(Copies of two checks each in the amount of \$159,658.12, marked Plaintiff's Exhibit 5 for identification, as of this date.)

MR. FREEDMAN: That's a little incorrect. I know you didn't mean it but one of the checks is .13.

MR. BURNS: 6 is a document which starts out "For value received" and is signed by Equimark Corporation, dated April 22, 1975.

(Document which starts out, "For value received," signed

by Equimark Corporation, dated April 22, 1975, marked Plaintiff's Exhibit 6 for identification, as of this date.)

MR. BURNS: 7 will be a document entitled "Cross Receipt."

(Document entitled "Cross Receipt," marked Plaintiff's Exhibit 7 for identification, as of this date.)

MR. BURNS: All of those have been one-page documents.

8 will be a two-page letter signed by Messrs. Garland and Ganassi addressed to Mr. Cancelliere dated April 22, 1975.

(Two-page letter dated April 22, 1975 signed by Messrs. Garland and Ganassi, addressed to Mr. Cancelliere, marked Plaintiff's Exhibit 8 for identification, as of this date.)

MR. BURNS: And 9 will be a three-page document entitled "Agreement" dated April 22, 1975, signed by Funding Systems Corporation and Equimark Corporation.

(Document entitled "Agreement" dated April 22, 1975, signed by Funding Systems Corporation and Equimark Corporation, marked Plaintiff's Exhibit 9 for identification, as of this date.)

1
2 BY MR. BURNS:

3 Q Mr. Kastelic, I show you Plaintiff's
4 Exhibits 3 through 9 for identification, and ask you if
5 these are all of the documents which Equimark signed
6 in respect of the sale of the Funding Systems stock to
7 Messrs. Ganassi and Garland.

8 A Yes.

9 Q Was there any change or modification made
10 of the loan documents respecting the loans by Equimark
11 or its subsidiaries to Funding Systems Corporation except
12 for Plaintiff's Exhibit 9 for identification?

13 A I don't understand. What do you mean was
14 there any change?

15 Q Was there any change in the terms, any of
16 the terms, what I'm getting at is, you waived certain
17 rights.

18 MR. FREEDMAN: Are you asking the
19 witness whether there were any other understandings
20 between the purchasers and the seller other than as
21 set forth--

22 MR. BURNS: I'm focusing on the
23 loan agreements now.

24 MR. FREEDMAN: Right, you are
25 asking if I understand the question were there

any other changes, were there any other arrangements between the purchasers and the seller with respect to any item--

MR. BURNS: No, it would be between Funding Systems Corporation and Equimark respecting the loans.

MR. FREEDMAN: Other than as set forth in the documents that you have here.

MR. BURNS: Other than as disclosed in these documents.

A Not that I know of. No.

Q At any time during 1975 was there any modification of the loan documents under which Funding Systems borrowed funds from Equimark?

A Yes.

MR. FREEDMAN: You are referring now to--

Q What were those modifications?

MR. FREEDMAN: I object. Let me get my question out. Are you referring to--strike that.

Are you referring to any modifications that were in some way related to the transaction that we are dealing with here?

1
2 MR. BURNS: No, I'm not. I'm
3 asking about changes during 1975 in the terms of
4 the loan agreements, respecting the loans between--
5 from Equimark to Funding Systems Corporation.
6 And he said yes, and now I'm asking him to tell
7 me what those modifications were.

8 A In 1975 the lender to Funding Systems
9 Corporation became Equimark Commercial Finance Company,
10 instead of the parent Equimark Corporation. The debt
11 was transferred from the parent to the subsidiary. And
12 they provided the funds.

13 Q Was there any change in any of the other
14 terms other than the identity of the party who is the
15 lender in those loan documents?

16 A I had nothing to do with the preparation
17 of these lending documents by Commercial Finance to Fund-
18 ing Systems Corporation.

19 Q So you don't know the answer to the question?

20 A No.

21 Q Who would know the answer to that question?

22 A Equimark Commercial Finance management.

23 Q Who there would know?

24 A William Holls, the president.

25 Q Were there any changes in those documents

1
2 in 1976?

3 MR. FREEDMAN: I'm going to object
4 to this line of questioning. I just don't--

5 MR. BURNS: It is the last question
6 on the topic.

7 MR. FREEDMAN: I appreciate that,
8 but I would like the record to reflect that I'm
9 objecting to the line of questions because I
10 don't see how it is relevant to the April sale
11 and you haven't applied it into the April sale
12 in any way and the fact that there may or may
13 not have been changes in the debt structure
14 between Equimark and Funding Systems or any other
15 changes of this sort which were--which you are
16 asking questions about, I don't think is germane
17 to this inquiry and I would like to preserve the
18 objection on the record.

19 MR. BURNS: You will let him
20 answer?

21 MR. FREEDMAN: I'll let him answer
22 your last question.

23 A Would you repeat the last question?

24 What documents?

25 Q We are talking about the loan documents.

1
2 A Yes, there were changes, but I'm not familiar
3 with the details. This would have been handled by
4 Commercial Finance.

5 Q Do you know the general nature of the changes?

6 MR. WALDMAN: It calls for a yes
7 or no answer.

8 A No.

9 Q Do you know anything about the changes?

10 MR. FREEDMAN: Again it calls for
11 a yes or no.

12 A No. Not the specifics on the changes.

13 Q Was there any discussion prior to the time
14 of the sale, April 22, 1975, of whether any representatives
15 of Equimark would be on the board of Funding Systems
16 Corporation after the sale?

17 A I did not discuss that matter with anyone.

18 Q Do you know whether anyone did from Equi-
19 mark?

20 A No.

21 Q When did you resign from the board of
22 Funding Systems Corporation?

23 A As I recall, June or July '75.

24 Q Wasn't it July 16th?

25 A I don't recall specific dates when it was

1
2 effective.

3 Q Do you have anything here that would re-
4 fresh your recollection?

5 A No, I didn't bring anything.

6 Q Do you know when Mr. Robbison resigned as
7 a director of Funding Systems Corporation?

8 A No.

9 Q He was a director of Funding Systems, was
10 he not?

11 A Yes.

12 Q Was he also an employee of Equimark?

13 A No.

14 Q Do you know when Mr. Bierer resigned as
15 a director of Funding Systems Corporation?

16 A Not the specific date, no.

17 Q Do you know what other Equimark employees
18 were directors of Funding Systems Corporation on April
19 22, 1975?

20 A Harold Pernisek. Myself. Those are the
21 only two I know definitely.

22 Q There were others, were there not?

23 A Yes.

24 Q And they were a majority of the board, were
25 they not?

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A I'm not sure.

Q And do you when Mr. Pernisek resigned from the board of Funding Systems Corporation?

A Not the specific date, no.

Q Do you know when any of the others resigned from the board?

MR. FREEDMAN: I'm going to object. I'll allow him to answer, but again I think you are straying far afield.

MR. WALDMAN: Further, Mr. Burns, don't you know when they resigned?

MR. BURNS: July 16th.

A I don't--

Q But you don't know?

A I don't remember that specific date, no. I would have no reason to make such an item of import on that specific date.

Q Did you attend any board meetings at Funding Systems Corporation after the April 22nd sale?

MR. FREEDMAN: I'll object again, but I'll allow him to answer. Again I don't see the relevancy of the attendance by Mr. Kastelic at Funding Systems' board meetings after the sale.

A I don't specifically recall whether I did

1
2 or did not.

3 Q Do you have anything that would refresh your
4 recollection?

5 A I could refer back to the corporate minutes
6 to see whether I was in attendance or not.

7 MR. FREEDMAN: Do you have the
8 minutes here?

9 MR. BURNS: No, I do not.

10 Do you, Mr. Waldman?

11 MR. WALDMAN: Do I have them here?

12 MR. BURNS: Yes.

13 MR. WALDMAN: No.

14 MR. BURNS: I would appreciate it
15 if you would refer to the minutes and perhaps
16 we could leave a space and if on the advice of
17 counsel you are permitted to do so, I would
18 appreciate having that question answered and I
19 would also like to know who else from Equimark,
20 if anybody, attended any board meetings of Funding
21 Systems Corporation after April 22, 1975.

22 MR. FREEDMAN: After what date?

23 MR. BURNS: April 22, 1975.

24 A

25 Q Was Mr. Robbison ever employed by Equimark

1
2 or any of its subsidiaries?

3 A Yes.

4 Q By whom was he employed and when?

5 A Equibank. He is an officer of Equibank.

6 I don't know when his date of employment started.

7 Q Was it prior to 1975?

8 A Yes.

9 Q And continues to the present time?

10 A Yes.

11 Q Are you aware that Marshal Gerson, a former
12 officer and director of Funding Systems Corporation sold
13 some of his stock in Funding Systems Corporation in
14 connection with the settlement of the litigation between
15 Mr. Gerson and Funding Systems Corporation and Equimark?

16 A I have read it in their 10-K.

17 Q Are you familiar with the identity of the
18 person to whom that stock was sold?

19 A No.

20 Q Do you have any idea as to whom it was
21 sold?

22 A None whatsoever.

23 Q Do you know how that transaction ever
24 happened to be arranged?

25 A No.

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Q Who would know?

MR. FREEDMAN: If you know.

Q At Equimark.

A I don't know.

Q Would Mr. Cancelliere know?

A I don't know.

Q Do you know whether Mr. Garland owns any stock in Equimark?

MR. WALDMAN: I object, for the record.

MR. FREEDMAN: I don't see how it is relevant. I would join in the objection. If the witness knows the answer, I will let him answer. Do you know if he presently owns stock in Equimark?

A No.

Q Do you know whether Mr. Ganassi owns any stock in Equimark?

A No.

Q Both of those questions you are saying you don't know?

A I do not know. We have 11,000 shareholders and I don't recall the names.

Q Do you know whether Mr. Garland's law firm

1
2 McCann, Garland, Ridall & Burke has ever represented
3 Equimark or any of its subsidiaries?

4 MR. WALDMAN: Objection.

5 MR. FREEDMAN: I'll object on the
6 same basis that I've continued to object here.
7 I think it is really irrelevant. I think I would
8 direct him not to answer that. I just don't see how
9 this relates to it. If you can tie it in, I'll
10 be glad to reconsider.

11 MR. BURNS: We are talking about
12 the relations between Equimark and the ostensible
13 new owners and we are trying to find out whether
14 the stock is just--or a completely independent
15 relation. And if Mr. Garland is an attorney for
16 Equimark and its subsidiaries, I think that would
17 be one item to be considered in determining how
18 independent he is of Equimark.

19 MR. WALDMAN: Well, my understanding
20 of the issue on this deposition is whether there
21 was a valid sale.

22 MR. BURNS: I think it is broader
23 than that. The question is whether there is
24 any control, because I don't think--

25 MR. FREEDMAN: We could argue

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2 over what we believe Judge Carter's decision to
3 be. Obviously the only person able to decide
4 that is Judge Carter and obviously he will. Your
5 view of what his decision means and my view, at
6 least appear to be somewhat different, and I don't--
7 I don't see how the question you have presented
8 has any bearing on the issue as I understand it
9 to be on this deposition.

10 Q Well, you have heard your counsel's instruc-
11 tions to you, I take it, Mr. Bierer, is that correct. I
12 mean Mr. Kastelic.

13 MR. FREEDMAN: I've not given him
14 an instruction. I said I join in the objection.

15 MR. BURNS: Will you permit him
16 to answer the question? What? Did you respond
17 to my question?

18 MR. FREEDMAN: No. I'm giving your
19 words effect in my mind.

20 MR. BURNS: Take all the time you
21 need.

22 (The question was read.)

23 MR. FREEDMAN: I'll allow him to
24 answer, if he knows the answer.

25 A Yes.

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A Yes.

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4

Q Which entities, Equimark or the subsidiaries,
has that law firm represented?

5

A Equibank.

6

Q And in what matters?

7

8

9

MR. FREEDMAN: I object. I don't
see how that has any, even remote relationship
to this. Do you want to connect it in some way?

10

11

12

13

14

MR. BURNS: I want an answer. I
think it is obvious. I want to know how much the
law firm is earning from these representations
and what types of matters it is representing Equi-
mark and its subsidiaries in.

15

16

MR. FREEDMAN: I'll allow him to
answer this question.

17

A Would you repeat the question, please?

18

19

MR. FREEDMAN: The question is, in
what matters has Mr. Garland's firm represented --

20

MR. BURNS: Equibank in.

21

22

MR. FREEDMAN: Do you have any
year in mind?

23

24

MR. BURNS: Let's say the period
1974 to the present.

25

A Various loan matters.

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Q How many loan matters?

A That I am aware of, two. That I can recall.

Q Could there be some you wouldn't be aware
of?

MR. FREEDMAN: I object. I won't
allow him to answer that. That's pure specula-
tion. If he knows of one, I won't have any
objection to him responding. You are asking him
to guess. I don't think that's appropriate.

Q Who would know what matters Mr. Garland's
law firm has represented Equibank in?

A In-house counsel.

Q At Equibank?

A Yes.

Q What's his name, or her name?

A John Nicoll.

Q How do you spell that?

A N-i-c-o-l-l.

Q Is Mr. Garland's law firm represented in
any other subsidiaries of Equibank, to your knowledge?

A No.

Q Do you know or are you saying you don't
know or are you saying that it has not?

A I'm saying no.

MR. FREEDMAN: No, it has not.

Q Has Mr. Garland's law firm represented Equimark in any matters, to your knowledge?

A To my knowledge, no.

Q Does Equimark or any of its subsidiaries have any loans outstanding to Mr. Garland's law firm, or to Mr. Garland?

(The question was read.)

MR. WALDMAN: I object to that.

There has been no showing whatever, the sale was not valid, the price was not fair, and these inquiries are going far afield and into--in my judgment.

MR. FREEDMAN: I would join in the objection. And I instruct him not to answer.

Q Mr. Kastelic, did you hear your counsel's instruction?

A Yes.

Q And do you intend to abide by it?

MR. FREEDMAN: We have been through that kind of question before. Mr. Kastelic will abide by his counsel's instructions.

MR. BURNS: Let's hear it from him.

A Yes.

Q Does Equimark or any of its subsidiaries

1 have any loans outstanding to Mr. Ganassi?
2

3 MR. WALDMAN: Same objection.

4 MR. FREEDMAN: Same objection. Same
5 instruction. Mr. Kastelic will answer in the
6 same way if he were asked by you. If you want to
7 tie this in in some way I would reconsider my
8 objection and instruction.

9 MR. BURNS: My point simply is if
10 Equimark or its subsidiaries have control over the
11 business and financial affairs of either Messrs.
12 Ganassi or Mr. Garland, it would seem to me to be
13 an indication of possibility of control over Fund-
14 ing Systems Corporation.

15 MR. WALDMAN: We need not debate
16 the legal issues here--

17 MR. BURNS: These are factual.

18 MR. WALDMAN: No, but the question
19 is, one question is whether that would have any
20 relevance in this lawsuit even if true. But
21 absent any attack on the validity of the sale, it
22 seems to me there is no basis for that.

23 MR. FREEDMAN: I stated my posi-
24 tion already. I think that we'll just prolong
25 the deposition and you are going far afield from

1 anything that is relevant or material or even
2 possibly calculated to lead to evidence which is
3 relevant or material to the issue which I under-
4 stand is before the court. And I see no relevance
5 between the kinds of questions you are asking or
6 have been asking for the last few minutes and the
7 validity of this stock to Mr. Garland and Ganassi
8 in April 1975, and although I've allowed you a
9 great deal of latitude in your areas of question-
10 ing, I think it is everybody's interest to begin to
11 focus on any remaining issues with respect to this
12 sale. That is the basis for my objection.
13

14 Q The question is still pending, if you
15 answer it, Mr. Kastelic.

16 MR. FREEDMAN: I've instructed him
17 not to answer.

18 Q Have you heard your counsel's instruction,
19 Mr. Kastelic?

20 A Yes.

21 Q Do you intend to abide by that instruction?

22 MR. FREEDMAN: We've been through
23 that before and he will abide by all his counsel's
24 instructions.

25 Q Did Equimark since January 1st of 1974 have

1 any loans outstanding to any corporation of which Mr.
2 Ganassi or Mr. Garland were a part of the management?

3 MR. FREEDMAN: I object and instruct
4 him not to answer on the same grounds. And he
5 would acquiesce in the instruction from his counsel.
6

7 Q Do you own any stock in Funding Systems
8 Corporation?

9 A Yes.

10 Q How much do you own?

11 A 200 shares.

12 Q Does Mr. Cancelliere own any stock in
13 Funding Systems Corporation?

14 MR. FREEDMAN: If you know.

15 A I don't know.

16 Q Do you know whether any other officer or
17 director of Equimark owns any stock in Funding Systems
18 Corporation?

19 A I don't know.

20 Q Who would know?

21 A Funding Systems or the transfer agent.

22 Q Do you know whether Mr. Garland or his law
23 firm has ever performed legal services for Mr. Cancelliere?

24 MR. FREEDMAN: I object and instruct
25 him not to answer on the same basis that we have

1
2 been through before. I don't see how Mr. Garland's
3 firm or Mr. Garland's legal services are in re-
4 lationship to this inquiry. He would abide by
5 my instructions and he will abide by my instructions.

6 Q Do you know whether Equimark or any of
7 its subsidiaries owns any stock in any corporation of
8 which either Mr. Garland or Mr. Ganassi is a member of the
9 management?

10 (The question was read.)

11 A No.

12 Q You are saying you don't know?

13 A I'm saying there are none. I would be
14 aware of the investments in the corporation and its sub-
15 sidiaries.

16 Q Do you know whether Mr. Cancelliere owns
17 any stock in any company of which Mr. Garland or Mr.
18 Ganassi are part of the management?

19 MR. FREEDMAN: You can answer.

20 A No.

21 Q No, you don't know or no--

22 A No, I don't know.

23 (Short recess taken.)

24 MR. BURNS: On the record. In
25 an off-the-record discussion we have ascertained

1
2 that--we have had--

3 MR. WALDMAN: Please. I object. I
4 object to putting off-the-record conversations
5 on the record. If you wish to make a record, let
6 us begin.

7 MR. BURNS: Yes. Off the record
8 we ascertained the fact that Mr. Ross was at
9 one time or another house counsel to Equibank and
10 I have offered to permit him to testify as to the
11 relations of Equimark and its subsidiaries to Mr.
12 Garland's law firm. And I--my understanding
13 is that because counsel for defendants thinks
14 that area of inquiry is irrelevant anyway they
15 are declining to do so.

16 MR. WALDMAN: We make, speaking
17 for Funding Systems, we make no blanket objections
18 to anything. We treat questions as they come.
19 Therefore, I suggest that you continue your
20 examination, ask what questions you wish and we'll
21 either object or not object.

22 MR. BURNS: Mr. Freedman, since he
23 happens to be in the room would you permit Mr.
24 Ross to take oath and testify?

25 MR. FREEDMAN: No.

1
2 MR. BURNS: I don't think we have
3 any further questions of this witness at this time.
4 We will pursue some of the questions he was not
5 permitted to answer and we do not believe that he
6 was the appropriate person to testify as to some
7 of these areas and we'll pursue that.

8 MR. FREEDMAN: Of course you can
9 pursue anything that you wish. That's your choice,
10 Mr. Burns. But I think the court has made it
11 quite clear, that this is the only witness that
12 you should be taking testimony from in this liti-
13 gation at this point in time, and the witness has
14 appeared voluntarily, in your offices for that
15 purpose. He has answered all of your questions
16 including most of the questions which had no
17 relevance to the litigation at this point as
18 found by Judge Carter, in my opinion, and if you
19 have further questions to ask of this witness at
20 this time, or at any other time, I prefer that you
21 ask them now.

22 I don't see any reason to require
23 this witness to return to your offices or even to
24 be deposed in Pittsburgh on the one issue that exists
25 in litigation at this time. If you have questions

1
2 concerning that issue, we'll be glad to have you
3 address them at this point. If there are reasons
4 to take Mr. Kastelic's deposition in the future on
5 some other issue, I can understand your hesitance
6 to terminate a deposition, but since he has testi-
7 fied today as to the only issue that we see being
8 present here, I believe that the deposition should
9 be concluded. I take that position.

10 MR. WALDMAN: Just so that I'm
11 clear, as I understand it--well, do you have any
12 further questions of this witness?

13 MR. BURNS: Obviously I have
14 several questions that he was instructed not to
15 answer.

16 MR. WALDMAN: Apart from that.

17 MR. BURNS: There were obviously
18 some that he was not qualified to respond and we
19 would in that case ask for another witness.

20 MR. WALDMAN: Apart from the
21 questions that you have asked.

22 MR. BURNS: We have no other
23 questions other than those that we have asked of
24 this particular witness.

25 MR. WALDMAN: Of Equimark.

1
2 MR. BURNS: No, this particular
3 individual.

4 MR. FREEDMAN: That goes back to
5 the question of whether any other witness from
6 Equimark should be testifying as to the issue
7 that is before the court, and I believe the court
8 order was specific, showing that there should be
9 a witness designated by Equimark with the approval
10 of the court as Mr. Kastelic. He has testified
11 and the court directs otherwise, of course we'll
12 follow the court's instructions. And make the
13 decision at that point whether further witnesses
14 are necessary.

15 MR. BURNS: There may have been
16 some questions as to which his recollection was
17 weak and I think we left some spaces in the
18 transcript for that. I assume we'll get satisfactory
19 answers, but we might also wish to pursue those
20 lines.

21 MR. FREEDMAN: Well, the questions
22 that you asked related to specific dates, as I
23 recall, as to which Mr. Kastelic had no recollec-
24 tion. And a satisfactory answer in my judgment
25 would be the date. And if you have the date, there

1
2 is nothing further to discuss. He will fully
3 have answered the question that you pose.

4 MR. BURNS: Whether that will
5 appear from the transcript or not--

6 MR. FREEDMAN: I believe the depo-
7 sition which we have held is the deposition re-
8 quired by the court, and, you know, we can pursue
9 it later on, if that's your position and the court
10 concurs with your position.

11 MR. BURNS: Right.

12 MR. FREEDMAN: Are you finished?

13 (Time noted: 1:30 p.m.)
14
15

16 Subscribed and sworn to before me
17 this ___ day of _____, 1976
18
19
20
21
22
23
24
25

C E R T I F I C A T E

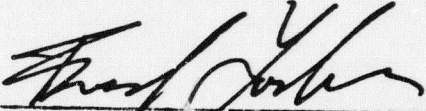
STATE OF NEW YORK)
 : ss
COUNTY OF NEW YORK)

I, FRED LORBER, a Certified Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That ROBERT F. KASTELIC, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 12th day of March, 1976.


FRED LORBER, CSR

March 1, 1976

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I N D E X

WITNESSES

PLAINTIFF'S

EXAMINATION BY

PAGE

Robert F. Kastelic

Mr. Burns

3

EXHIBITS

PLAINTIFF'S

FOR IDENT.

- 1 Letter on the letterhead of
Marion W. Sprague, dated
September 24, 1973 addressed
to "Dear Gary" 54
- 2 Xerox copy of letter on the
letterhead of Marion W. Sprague
addressed to M. A. Cancelliere,
dated December 13, 1973 55
- 3 Letter dated April 1, 1975
from Equimark Corporation to
G. Gray Garland, Jr. and Floyd
R. Ganassi 82
- 4 Document entitled "Sale of
Funding Systems Corporation
Closing Agenda" 82
- 5 Copies of two checks each in the
amount of \$159,658.12 82

BLITZ-LORBER REPORTING CO.

15 PARK ROW, N. Y. 10018

PHONE: 349-5790

A-510-

INDEX OF EXHIBITS CONTINUEDPLAINTIFF'SFOR IDENT.

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| 5 | | | |
| 6 | 6 | Document which starts out, "For value received," signed by Equimark Corporation, dated April 22, 1975 | 82 |
| 7 | | | |
| 8 | 7 | Document entitled "Cross Receipt" | 83 |
| 9 | | | |
| 10 | 8 | Two-page letter dated April 22, 1975 signed by Messrs. Garland and Ganassi, addressed to Mr. Cancelliere | 83 |
| 11 | | | |
| 12 | 9 | Document entitled "Agreement," dated April 22, 1975, signed by Funding Systems Corporation and Equimark Corporation | 83 |
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EXHIBIT "3" TO AFFIDAVIT IN OPPOSITION
TO MOTION TO DISMISS

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

EQUIBANK N.A.,

Plaintiff

vs.

THAYER R. POTTER, an individual; and)
PITTSBURGH HOCKEY CORPORATION, a)
corporation; trading and doing)
business as PITTSBURGH HOCKEY)
LIMITED PARTNERSHIP, a Limited)
Partnership; and)

No. GD75-13599

THAYER R. POTTER, an individual; and)
PITTSBURGH HOCKEY LIMITED PARTNER-)
SHIP, a Limited Partnership; trading)
and doing business as PITTSBURGH)
PENGUIN PARTNERS, a Limited Partner-)
ship; and)

PITTSBURGH HOCKEY CORPORATION, a)
corporation; and)

THAYER R. POTTER, an individual.)

Defendants)

COMPLAINT

1. The plaintiff, Equibank N.A., is a national banking association with offices at Fifth Avenue and Smithfield Street, Pittsburgh, Allegheny County, Pennsylvania and brings this Complaint as payee and holder of the within instrument hereinafter

set forth.

2. The defendant, Thayer R. Potter, is an individual residing at 207 Sunridge Road, Pittsburgh, Pennsylvania 15238.

3. The defendant, Pittsburgh Hockey Corporation, is a Pennsylvania corporation with principal offices at Civic Arena Gate 7, Auditorium Place, Pittsburgh, Pennsylvania 15219.

4. The defendant, Pittsburgh Hockey Limited Partnership, is a limited partnership organized under the laws of the Commonwealth of Pennsylvania with its principal office at Civic Arena Gate 7, Auditorium Place, Pittsburgh, Pennsylvania 15219.

5. The defendant, Thayer R. Potter, is the individual described in paragraph 2 hereof.

6. The defendant, Pittsburgh Hockey Limited Partnership, is a limited partnership described in paragraph 4 hereof.

7. The defendant, Pittsburgh Penguin Partners, is a limited partnership organized under the laws of the Commonwealth of Pennsylvania with its principal office at Civic Arena, Gate 7, Auditorium Place, Pittsburgh, Pennsylvania 15219.

8. The defendant, Pittsburgh Hockey Corporation, is a Pennsylvania corporation with principal office at Civic Arena Gate 7, Auditorium Place, Pittsburgh, Pennsylvania 15219.

9. The defendant, Thayer R. Potter, is an individual residing at 207 Sunridge Road, Pittsburgh, Pennsylvania 15238.

10. The defendants named in paragraphs 2 and 3 hereof are general partners of Pittsburgh Hockey Limited Partnership.

11. The defendants named in paragraphs 5 and 6 hereof are general partners of Pittsburgh Penguin Partners, a limited partnership.

12. The plaintiff's claim in this action is founded upon a certain instrument, a true and correct reproduction of the same showing the signatures of the Makers as follows:

- (a) Thayer R. Potter, General Partner of Pittsburgh Penguins Partners (limited partnership);
- (b) Thayer R. Potter, General Partner of Pittsburgh Hockey Limited Partnership
- (c) Peter Block, President of Pittsburgh Hockey Corporation

- (d) Thayer R. Potter, General Partner of Pittsburgh Hockey Limited Partnership
- (e) Peter Block, President of Pittsburgh Hockey Corporation
- (f) Peter Block, President of Pittsburgh Hockey Corporation
- (g) Thayer R. Potter, Individually.

Said instrument evidences a loan by the plaintiff to the Makers of this Note in the amount of \$474,000.00. Said instrument is dated July 2, 1974 and is attached hereto and incorporated herein by reference and marked as Exhibit "A".

13. Plaintiff has demanded payment from the defendants but in spite of numerous demands from plaintiff, the defendants have refused and continue to refuse to pay the principal or the interest on the said Note.

14. There has been no Assignment or transfer of the instrument attached hereto as Exhibit "A".

15. Judgment has not been entered on said instrument and any jurisdiction.

16. As of the date of the filing of this Complaint, there is a principal amount due and owing on the indebtedness evidenced by Exhibit "A" of \$472,297.46.

17. The interest rate agreed upon by plaintiff and the Makers of this Note attached hereto as Exhibit "A" is the prime commercial lending rate in effect from time to time at Equibank N.A. plus three and one-half percent (3-1/2%) per annum.

18. The present interest due and owing on said obligation as of the date of the filing of this Complaint is \$5,103.33.

19. The itemization of the amount due under the terms of said instrument is as follows:

| | | |
|-----|--|--------------|
| (a) | principal sum of | \$472,297.46 |
| (b) | attorneys' fees | 70,844.62 |
| (c) | interest up to the date of the filing of this Complaint | 5,103.33 |
| | | <hr/> |
| (d) | TOTAL | \$548,245.41 |

WHEREFORE, the plaintiff, Equibank N.A., demands judgment in its favor against Thayer R. Potter, an individual; Pittsburgh Hockey Corporation, a corporation; Pittsburgh Hockey Limited Partnership, a Limited Partnership; Thayer R. Potter, an individual; Pittsburgh Hockey Limited Partnership, a Limited Partnership; Pittsburgh Penguin Partners, a Limited Partnership; Pittsburgh Hockey Corporation, a corporation; and Thayer R. Potter, an individual; as authorized by the Warrant of Attorney in the total sum of \$548,254.41 at the prime commercial lending rate in effect from time to time at Equibank N.A. plus 3-1/2% per annum from June 13, 1975 and with costs of suit.

McCANN, GARLAND, RIDALL & BURKE

By /s/ Edward C. Wachter, Jr.
Attorneys for the Plaintiff

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

| | | |
|--------------------------------------|---|----------------|
| EQUIBANK N.A., |) | |
| |) | |
| Plaintiff |) | |
| |) | |
| vs. |) | |
| |) | |
| THAYER R. POTTER, an individual; and |) | No. GD75-13597 |
| PITTSBURGH HOCKEY CORPORATION, a |) | |
| corporation; trading and doing |) | |
| business as PITTSBURGH HOCKEY |) | |
| LIMITED PARTNERSHIP, a Limited |) | |
| Partnership; and |) | |
| |) | |
| THAYER R. POTTER, an individual; and |) | |
| PITTSBURGH HOCKEY LIMITED PARTNER- |) | |
| SHIP, a Limited Partnership; trading |) | |
| and doing business as PITTSBURGH |) | |
| PENGUIN PARTNERS, a Limited Partner- |) | |
| ship; and |) | |
| |) | |
| PITTSBURGH HOCKEY CORPORATION, a |) | |
| corporation; and |) | |
| |) | |
| THAYER R. POTTER, an individual. |) | |
| |) | |
| Defendants |) | |

COMPLAINT

1. The plaintiff Equibank N.A. is a national banking association with offices at Fifth Avenue and Smithfield Street, Pittsburgh, Allegheny County, Pennsylvania and brings this Complaint as Payee and holder of the within instrument hereinafter

set forth.

2. The defendant, Thayer R. Potter, is an individual residing at 207 Sunridge Road, Pittsburgh, Pennsylvania 15238.

3. The defendant, Pittsburgh Hockey Corporation, is a Pennsylvania corporation with principal offices at Civic Arena Gate 7, Auditorium Place, Pittsburgh, Pennsylvania 15219.

4. The defendant, Pittsburgh Hockey Limited Partnership, is a limited partnership organized under the laws of the Commonwealth of Pennsylvania with its principal office at Civic Arena Gate 7, Auditorium Place, Pittsburgh, Pennsylvania 15219.

5. The defendant, Thayer R. Potter, is the individual described in paragraph 2 hereof.

6. The defendant, Pittsburgh Hockey Limited Partnership, is a limited partnership described in paragraph 4 hereof.

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9. The defendant, Thayer R. Potter, is an individual residing at 207 Sunridge Road, Pittsburgh, Pennsylvania 15238.

10. The defendants named in paragraphs 2 and 3 hereof are general partners of Pittsburgh Hockey Limited Partnership.

11. The defendants named in paragraphs 5 and 6 hereof are general partners of Pittsburgh Penguin Partners, a limited partnership.

12. The plaintiff's claim in this action is founded upon a certain instrument, a true and correct reproduction of the same showing the signatures of the Makers as follows:

- (a) Thayer R. Potter, General Partner of Pittsburgh Penguins Partners (limited partnership);
- (b) Thayer R. Potter, General Partner of Pittsburgh Hockey Limited Partnership
- (c) Peter Block, Vice President of Pittsburgh Hockey Corporation

- (d) Thayer R. Potter, General Partner of Pittsburgh Hockey Limited Partnership
- (e) Peter Block, Vice President of Pittsburgh Hockey Corporation
- (f) Peter Block, Vice President of Pittsburgh Hockey Corporation
- (g) Thayer R. Potter, individually.

Said instrument evidences a loan ("Loan") by the plaintiff to the Makers of this Note in the amount of \$1,000,000.00 made on February 1, 1974. Said instrument is attached hereto and incorporated herein by reference and marked as Exhibit "A".

13. Said Loan was made by Equibank N.A. to defendants pursuant to the terms of a Loan Agreement ("Loan Agreement") dated the first day of February, 1974. A true and correct copy of the said Loan Agreement is attached hereto and incorporated herein by reference and marked as Exhibit "B".

14. An event of default, as defined in the Loan Agreement has occurred by reason of defendants' failure to make payment when due of an installment of principal or interest due under the Note.

15. As a result of defendants' failure to make payments when due, plaintiff was entitled to and did declare the unpaid balance of the obligation and all accrued interest thereon to be immediately due and payable and demanded payment of the same from the defendants.

16. Despite numerous demands by plaintiff, the defendants have refused and continue to refuse to pay either the principal of the interest on said instrument.

17. There has been no Assignment or transfer of the instrument attached hereto as Exhibit "A".

18. Judgment has not been entered on said instrument and any jurisdiction.

19. As of the date of the filing of this Complaint, the Makers of this Note have paid a total of \$170,281.17 leaving on the said date a principal amount due and owing on the indebtedness evidenced by Exhibit "A" of \$829,718.83.

20. The interest rate agreed upon by plaintiff and the Makers of this Note attached hereto as Exhibit "A" is ten percent (10%) per annum.

21. The present interest due and owing on said obligation as of the date of the filing of this Complaint is \$40,862.30.

22. The itemization of the amount due under the terms of said instrument is as follows:

| | |
|---|---------------|
| (a) principal sum of | \$ 829,718.83 |
| (b) attorneys' fees | 124,457.82 |
| (c) interest up to the date of the filing of this Complaint | 40,862.30 |
| (d) TOTAL | \$ 995,038.95 |

WHEREFORE, the plaintiff, Equibank N.A., demands judgment in its favor against Thayer R. Potter, an individual; Pittsburgh Hockey Corporation, a corporation; Pittsburgh Hockey Limited Partnership, a Limited Partnership; Thayer R. Potter, an individual; Pittsburgh Hockey Limited Partnership, a Limited Partnership; Pittsburgh Penguin Partners, a Limited Partnership; Pittsburgh Hockey Corporation, a corporation; and Thayer R. Potter, an individual as authorized by the Warrant of Attorney in the total sum of \$995,038.95 with

interest on \$995,038.95 at 10% per annum from June 13, 1975
and with costs of suit.

MCCANN, GARLAND, RIDALL & BUIKE

By /s/ Edward C. Wachter, Jr.
Attorneys for the plaintiffs

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

EQUIBANK, N.A.,)

Plaintiff,)

vs.)

THAYER R. POTTER, an individual; and)
PITTSBURGH HOCKEY CORPORATION, a)
corporation; trading and doing)
business as PITTSBURGH HOCKEY LIMITED)
PARTNERSHIP; a Limited Partnership;)
and)

THAYER R. POTTER, an individual; and)
PITTSBURGH HOCKEY LIMITED PARTNERSHIP,)
a Limited Partnership; trading and)
doing business as PITTSBURGH PENGUIN)
PARTNERS; a Limited Partnership; and)

PITTSBURGH HOCKEY CORPORATION, a)
corporation; and)

THAYER R. POTTER, an individual; and)

THAYER R. POTTER, an individual, and)
JEAN K. POTTER, his wife, PETER H.)
BLOCK, an individual and INA L. BLOCK,)
his wife, ALBERT H. BURCHFIELD, III,)
an individual, JANET B. KEENER, an)
individual, and KATHARINE R. POTTER,)
an individual,)

Defendants)

No. GD75-13598

Execution No. GD75-13610

ANSWER TO PETITION OF ALBERT H. BURCHFIELD, III,
FOR RULE TO SHOW CAUSE WHY
JUDGMENT SHOULD NOT BE OPENED

AND NOW, comes Equibank N.A., the Plaintiff herein, and by its attorneys, McCann, Garland, Ridall & Burke, Edward C. Wachter, Jr., Esquire and David P. Truax, Esquire, files the within Answer to the Petition of Albert H. Burchfield, III, For Rule To Show Cause Why Judgment Should Not Be Opened, setting forth the following:

COUNT I

1. The averments of Paragraph 1 of the above named Defendant's Petition are admitted.

Petition are admitted.

3. The averments of Paragraph 3 of the above named Defendant's Petition are admitted only insofar as it is alleged that Plaintiff confessed judgment against Petitioner, (one of the Defendants herein), on June 13, 1975, pursuant to the warrant of attorney contained in Paragraph 10 of the Agreement of Guaranty and Suretyship attached to and made a part of Defendant Burchfield's Petition as Exhibit "A" and which said Agreement is incorporated herein by reference with the same force and effect as if fully set forth, (hereinafter referred

to as "Agreement"). Further, it is alleged that said judgment was confessed by reason of default in interest payments due and owing pursuant to the terms of a Loan Agreement dated February 1, 1973, (hereinafter referred to as "Loan Agreement"), entered into by the Plaintiff herein, (then Western Pennsylvania National Bank), and Pittsburgh Penguin Partners, Pittsburgh Hockey Limited Partnership, Thayer R. Potter and Pittsburgh Hockey Corporation; a true and correct copy of said Loan Agreement is hereto attached, made a part hereof and designated Exhibit "A"; finally, it is alleged that Plaintiff, on June 16, 1975, caused the Prothonotary of Allegheny County to issue a Writ of Execution pursuant to said judgment and directed Interrogatories to Pittsburgh National Bank, Mellon Bank N.A. and Union National Bank of Pittsburgh as Garnishees; all execution proceedings were stayed as to Defendant Burchfield pursuant to an Order of Court dated July 3, 1975. The remaining averments of Paragraph 3 of Defendant Burchfield's Petition are specifically denied insofar as they allege a purported authority of the Plaintiff to confess judgment against said Defendant for the unpaid balance due under the February 1, 1973, Loan Agreement and pursuant to Paragraph 10 of the Agreement.

On the contrary, it is alleged that Paragraph 10 of the Agreement specifically authorizes Plaintiff to appear for said Defendant and with or without one or more declarations filed confess a judgment or judgments at any time against said Defendant for the unpaid balance thereof together with costs of suit and an Attorney's commission of fifteen percent (15%) for collection; further, Paragraph 10 of said Agreement specifically authorizes the confession of a judgment or judgments, in the manner and according to the terms set forth above, as to both the unpaid balance due under the terms of the February 1,

* * * * *

In further answer thereto, the allegations of Paragraph 23 of the within Answer are incorporated by reference.

WHEREFORE, as to Count X, Plaintiff prays your Honorable Court to refuse to vacate said judgment and dismiss the instant proceeding, refuse to assess the costs of the within action against Plaintiff and discharge the Rule To Show Cause why judgment should not be opened.

MCCANN, GARLAND, RIDALL & BURKE

By /s/ Edward C. Wachter, Jr.
Edward C. Wachter, Jr.

By /s/ David P. Truax
David P. Truax

Attorneys for Plaintiff

EXHIBIT "4" TO AFFIDAVIT IN
OPPOSITION TO MOTION TO DISMISS

MCCANN, GARLAND, RIDALL & BURKE

ATTORNEYS AT LAW
300 MELLON BANK BUILDING
525 WILLIAM PENN PLACE

PITTSBURGH, PENNSYLVANIA 15219

AREA CODE 412
TELEPHONE 566-0000

JOHN A. MCCANN
G. GRAY GARLAND, JR.
EDMUND W. RIDALL, JR.
CHARLES H. BURKE
EDWARD C. WACHTER, JR.
EWING C. HANCOCK

August 30, 1974

I. E. S. Properties, Inc.
50 Union Avenue
Irvington, New Jersey 07111

Gentlemen:

We represent Equibank N.A., formerly Western Pennsylvania National Bank, in the matter of their loan to you having a present principal balance of \$195,677.86 plus interest from May 31, 1974.

Demand is hereby made for the payment of principal and interest on said note.

Unless said payment is made on or before 12 noon Eastern Daylight Time on September 5, 1974, we shall take such appropriate legal steps as we deem necessary for the collection of principal and interest.

Very truly yours,

MCCANN, GARLAND, RIDALL & BURKE

BY:

G. Gray Garland, Jr.

GGG:mm

CERTIFIED MAIL

A-530

BEST COPY AVAILABLE

MCCANN, GARLAND, RIDALL & BURKE

ATTORNEYS AT LAW

300 N. LEXINGTON BANK BUILDING

525 WILLIAM PENN. PLACE

PITTSBURGH, PENNSYLVANIA 15219

AREA CODE 412

TELEPHONE 566-1010

JOHN A. MCCANN
G. GRAY GARLAND, JR.
EDMUND W. RIDALL, JR.
CHARLES R. BURKE
EDWARD C. WACHTER, JR.
EWING C. DASHOR

August 30, 1974

Investors Economic Systems, Inc.
50 Union Avenue
Irvington, New Jersey 07111

Gentlemen:

We represent Equibank N.A., formerly Western Pennsylvania National Bank, in the matter of your loan from them in the principal amount of \$100,000.00.

Demand is hereby made for payment of principal and interest on said loan.

Unless payment is received by Equibank N.A. on or before 12 noon Eastern Daylight Time on Thursday, September 5, 1974, we shall take appropriate legal steps for the collection thereof, including the application of Certificate of Deposit pledged by I. E. S. Management Group, Inc. as collateral therefor.

Very truly yours,

MCCANN, GARLAND, RIDALL & BURKE

BY:

G. Gray Garland, Jr.

GGG:mmn

cc: I. E. S. Management Group, Inc.
50 Union Avenue
Irvington, New Jersey 07111

CERTIFIED MAIL

A-530 (a)

MCCANN, GARLAND, RIDALL & BURKE

ATTORNEYS AT LAW

300 MELLON BANK BUILDING

525 WILLIAM PENS PLACE

PITTSBURGH, PENNSYLVANIA 15219

AREA CODE 412

TELEPHONE 566-0000

JOHN A. MCCANN
O. GRAY GARLAND, JR.
FREDERICK W. RIDALL, JR.
CHARLES H. BURKE
EDWARD C. WACHTER, JR.
EWING C. DASHOR

August 30, 1974

I. E. S. Management Group, Inc.
50 Union Avenue
Irvington, New Jersey 07111

Gentlemen:

We represent Equibank N.A., formerly Western Pennsylvania National Bank, in the matter of their loan to Investors Economic Systems, Inc.

The Demand has this day been made for the payment thereof. Further a note is presently in default since the borrower has failed to pay interest thereon since June 15, 1974.

Accordingly, you are notified that collateral for said loan, which was put up by you, will be applied to payment of the principal and interest of said note, unless payment thereon is made on or before 12 noon Eastern Daylight Time on Thursday, September 5, 1974.

Very truly yours,

MCCANN, GARLAND, RIDALL & BURKE

BY:

G. Gray Garland, Jr.

GGG:mmn

cc: Investors Economic Systems, Inc.
50 Union Avenue
Irvington, New Jersey 07111

CERTIFIED MAIL

A-530 (b)

EXHIBIT "5" TO AFFIDAVIT IN OPPOSITION
TO MOTION TO DISMISS

MARION W. SPRAGUE
OVERLOOK AT SKUNKS MISERY ROAD
LATTINGTOWN, LOCUST VALLEY, N.Y. 11560

DLF EX. 2
3/1/66
13 December 1973

Dear Cancy-

As you requested at Funding Systems' last directors' meeting, I am pleased to renew the request for you to meet with the chief executive of Colonial Commercial Corporation to entertain the extension of the following to Equimark:

- 1) Cash for all equity at \$3.00 per share immediately,
- 2) Release, by assumption, of the Equimark guarantees,
- 3) Cessation of the need for Equimark's continuing cash-injection support, and
- 4) A workout-retirement on mutually favorable terms of the debt now held by certain of the Equimark family.

As to Colonial, I have previously advised Don Bush that all of the litigation set forth in their prospectus that he was concerned about has been successfully resolved. Garry Pote has been furnished an interesting set of supplemental financial information on the company at mid-year and I had asked him to check the following bank references if you like: Tom Donovan, Sr. VP at Marine Midland; Bob Scheuing, Pres of Hempstead Bank; and Roger Loo or Pat Clifford at Security National. I'll appreciate your consideration and advice.

Best regards,

Mr. M. A. Cancelliere, Chairman & President
Equimark Corporation
5th Ave and Smithfield Street
Pittsburgh, Pennsylvania 15222

REPLY AFFIDAVIT IN SUPPORT
OF MOTION TO DISMISS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
RICHARD S. KAYE,

: 74 Civ. 5628 (R.L.C.)

Plaintiff,

-against-

: REPLY AFFIDAVIT IN
SUPPORT OF MOTION
TO DISMISS

FUNDING SYSTEMS CORPORATION
and EQUIMARK CORPORATION,

Defendants.

-----x
STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

ANDREW C. FREEDMAN, being duly sworn, deposes and says:

1. I am an attorney with the firm of Reavis & McGrath, counsel for defendant Equimark Corporation ("Equimark"). This reply affidavit is submitted in support of Equimark's motion, pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure, to dismiss the amended complaint on the ground that this Court lacks subject matter jurisdiction over the claims alleged against Equimark therein.

2. In its January 29, 1976 Order, this Court decided that the remaining issue in this action concerning Equimark was the "validity of the FSC sale of stock" by Equimark. This Order was entered after the Court considered and rejected plaintiff's

strenuous argument that he needed extensive discovery on the issue of whether Equimark exercised any "control" over Funding Systems Corporation ("FSC").

3. In his response to this motion, plaintiff again argues at great length that he has been foreclosed from further discovery on the spurious "control" issue. (Burns Aff. ¶¶ 3-7). Plaintiff confronts the remaining issue herein at only one point and concedes it. Thus, the Burns Affidavit states "It appears from papers provided by Equimark, however, that the stock in question was sold by Equimark to G. Gray Garland, Jr. and Floyd R. Ganassi". (Burns Aff. ¶4). Plaintiff does not and apparently cannot contradict Equimark's continued assertion that it no longer owns any FSC shares.

4. To attempt to cover this fatal flaw, plaintiff sets forth at great length his many "suspensions" concerning Equimark, based solely upon conjecture and innuendo coupled with out-of-context quotations from unrelated matters. But nothing therein alleged by plaintiff detracts from the obvious and inevitable conclusion that since Equimark has now concededly sold its FSC shares, it can no longer be enjoined from using them (the only relief sought herein.) (Burns Aff. ¶3).

5. Plaintiff has referred to the alleged deficiencies in the discovery afforded to him by this Court. (Burns Aff. ¶2). However, this discovery, to the extent that he now claims it deficient, was

the discovery of his choice and he cannot now be heard to complain.

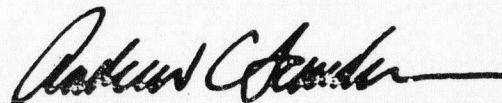
6. Since April 1975 plaintiff has been advised of Equimark's claim of mootness. Rather than face this issue, he has unsuccessfully sought to divert the Court's attention by asserting irrelevant facts as a basis for unwarranted and unfounded conclusions. Finally, when given an opportunity by the Court to conclude discovery on the remaining issue and file whatever "motion, memoranda or other pleadings he deemed appropriate", plaintiff delayed his discovery until the last moment, and then defaulted.

7. Moreover, plaintiff was given the opportunity by this Court to take unlimited discovery on the remaining issue before it -- the validity of Equimark's sale of FSC stock. Plaintiff could have taken the depositions of Messrs. Garland and Ganassi, FSC's transfer agent or any other person reasonably calculated to provide evidence on this issue -- plaintiff willingly elected not to do so. His failure to adduce evidence to refute Equimark's claim that it sold its FSC shares is now conclusive on this issue.

8. Plaintiff repeatedly claims in conclusory fashion and without support that there is evidence in the exclusive possession of Equimark on this remaining issue before the Court. However, the closing documents relating to Equimark's sale of its FSC stock were supplied as exhibits to Mr. Kastelic's deposition, and plaintiff has never refuted their contents. (Exhs. B and C to this motion).

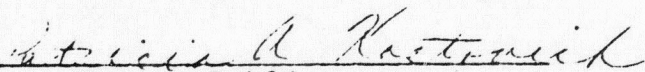
9. The cases cited by plaintiff in his brief are wholly inapposite to this motion. Since they concern summary judgment. The brief never addresses the sole issue on this motion; whether his claim against Equimark is now moot. Moreover, in contrast to the present action, Schoenbaum v. Firstbrook, 405 F.2d 215 (2d Cir. 1968), concerned the Court's refusal to allow that plaintiff an opportunity for discovery in a derivative action. This is not a derivative action and plaintiff has been allowed sufficient time to complete discovery. The other principal cases cited by plaintiff, Robinson v. Penn Central Co., 58 F.R.D. 436 (S.D.N.Y. 1973), was a securities fraud case in which there had been "little or no discovery." In the present case, plaintiff's discovery has refuted his claim.

WHEREFORE, for all of the foregoing reasons, Equimark requests that the amended complaint be dismissed against it with prejudice.



Andrew C. Freedman

Sworn to before me this
15th day of April, 1976.



Notary Public

PATRICIA A. KOSTOVICH
Notary Public, State of New York
No. 21451179
Qualified in New York County
Commission Expires March 30, 1977

OPINION AND ORDER OF
JUDGE CARTER DATED MAY 5, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
RICHARD S. KAYE, :
 :
Plaintiff, :
 :
- against - : 74 Civ. 5628
 :
FUNDING SYSTEMS CORPORATION, :
and EQUIMARK CORPORATION, :
 :
Defendants. :
----- x

A P P E A R A N C E S:

Messrs. Alexander, Katz & Rosenberg
200 East 42nd Street
New York, New York 10017
Attorneys for Plaintiff

Messrs. Reavis & McGrath
One Chase Manhattan Plaza
New York, New York 10005
by Stephen R. Steinberg, Esq.
Andrew C. Freedman, Esq.
Stephen H. Lewis, Esq.
Attorneys for Defendant
Equimark Corporation

CARTER, District Judge

O P I N I O N

Defendant Equimark Corporation ("Equimark") has moved, pursuant to Rule 12(h)(3), F.R.Civ.P., to dismiss plaintiff's amended complaint on the ground that this court lacks subject-matter jurisdiction over the claims alleged therein. The motion is granted.

Facts

This action was commenced on December 23, 1974. At the time the action was commenced, Equimark was the majority shareholder of Funding Systems Corporation ("FSC"). Plaintiff, a shareholder of FSC, claimed that Equimark unlawfully acquired its FSC stock; his amended complaint sought an injunction prohibiting Equimark from using its purported ownership of the unlawfully acquired stock:

- (a) to create a quorum at any meetings of the shareholders of FSC; and/or
- (b) to exercise any control over the affairs of FSC; and
- (c) to vote any of the unlawfully acquired stock.

Except for costs and disbursements and reasonable attorneys' fees, no further relief was sought in plaintiff's amended complaint.

On April 22, 1975, Equimark announced that it had sold all of its FSC shares, and by letters dated April 23, 1975, and May 9, 1975, Equimark advised the court and counsel for the parties that Equimark's shares of FSC had been sold. In addition, copies of various documents evidencing the sale were furnished to court and counsel. Thus, since the Spring of 1975, Equimark has consistently maintained that plaintiff's action is moot and that the court therefore lacks subject-matter jurisdiction over this action.

In response to Equimark's claim of mootness, plaintiff argued that Equimark's sale of its FSC shares was a sham. In order to clarify this claim, Equimark offered the plaintiff the opportunity to examine Robert F. Kastelic, Equimark's Executive Vice President and the person whom Equimark represented was most familiar with the sale of the FSC stock. Plaintiff rejected this offer, demanding instead that he be allowed to depose M. A. Cancelliere, Equimark's Chairman and Chief Executive Officer, despite the fact that Equimark had advised plaintiff by letter dated November 10, 1975, that Cancelliere was not particularly knowledgeable with regard to the transaction.

Subsequently, plaintiff moved, pursuant to Rule 37, F.R.Civ.P., for an order compelling discovery of Equimark through the production of various documents, and compelling the deposition of M. A. Cancelliere. On January 29, 1976, plaintiff's motion was denied in that the plaintiff had demonstrated no reasons for his refusal to depose Equimark through its Executive Vice President, Robert F. Kastelic, whom the defendant represented as the most knowledgeable officer of the corporation in respect of the sale of the FSC shares. It was further directed that plaintiff

"be afforded the opportunity to depose Mr. Kastelic but that deposition must be taken within thirty (30) days from the date this motion appears in the NEW YORK LAW JOURNAL; and within that period, plaintiff is ordered (1) to conclude discovery in respect of the issue before the court, which is the validity of the FSC sale of stock and (2) to file whatever motion, memoranda, or other pleadings that it deems appropriate by March 15, 1976. The defendants are to answer by March 26, 1976, with the plaintiff replying, that is, if desired, by March 31, 1976. The matter will then be before the court for final disposition."

Notice of this order appeared in the NEW YORK LAW JOURNAL on February 3, 1976.

On February 19, 1976, plaintiff noticed Mr. Kastelic's deposition to be taken on March 1, 1976, at the office of plaintiff's counsel. No motions or

other pleadings were filed by March 15th as I had directed. Instead, by letter dated March 15, 1976, plaintiff sought additional time to make motions. This request was denied.

My order of January 29, 1976, was intended to give plaintiff a final opportunity to obtain discovery relative to his contention that the sale of the FSC stock was a sham. The documents evidencing the sale of the FSC stock indicate that such stock was sold by Equimark to G. Gray Garland, Jr. and Floyd R. Ganassi. Plaintiff argues that he is in possession of information to the effect that Mr. Garland is a member of a Pittsburgh law firm which appears to have done substantial legal work for Equimark and for its chairman and chief executive officer, M. A. Cancelliere, and that other companies owned by Messrs. Garland and Ganassi may have substantial obligations to Equimark. See Burns Aff. ¶¶ 4, 7. Based on this information, plaintiff argues that Equimark continues to assert control over the affairs of FSC through these nominees. However, nothing in my order of January 29, 1976, prevented plaintiff from seeking discovery with respect to these allegations. Indeed, for over a year plaintiff has not seen fit to depose Messrs. Garland or Ganassi, or any other individual who

might shed light on his contentions regarding continued control by Equimark over the affairs of FSC. It is clear that plaintiff has had ample opportunity, both before and after the order of January 29th, to conduct relevant discovery, yet he has failed to avail himself of this opportunity.

There has been absolutely no evidence adduced to support plaintiff's claim that the sale by Equimark of the FSC stock was a sham. Thus, Equimark's contention that it no longer owns any shares of FSC stock, and the documentary evidence submitted in support of this contention, stand un rebutted. Furthermore, there is no reason on the record before me to depart from the March 15, 1976 deadline for the completion of discovery and the filing of any motions. Plaintiff's willful failure to abide by the order of January 29th to conclude discovery on the only issue remaining before me requires that this action, at long last, be terminated.

It is clear that when there no longer exists a case or controversy between the parties, an action becomes moot, and the court may dismiss the action for lack of subject-matter jurisdiction. Rule 12(h)(3), F.R.Civ.P. See SEC v. Medical Committee for Human Rights, 404 U.S. 403 (1972); Powell v. McCormack, 395

U.S. 486, 496 (1969); see generally, 13 Wright, Miller and Cooper, Federal Practice and Procedure, §3533 (1975 ed.).

Since this action has become moot in that Equimark is no longer able to perform the acts which plaintiff seeks to enjoin, plaintiff's amended complaint against Equimark is hereby dismissed.

SO ORDERED.

Dated: New York, New York
May 6, 1976

ROBERT L. CARTER
U.S.D.J.

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

RICHARD S. KAYE, :
 :
Plaintiff, : 74 Civ. 5628 (RLC)
 :
-against- :
 : NOTICE OF APPEAL
FUNDING SYSTEMS CORPORATION :
and EQUIMARK CORPORATION, :
 :
Defendants. :
----- x

S I R S:

PLEASE TAKE NOTICE that plaintiff Richard S. Kaye hereby
appeals to the United States Court of Appeals for the Second
Circuit from all of the order of this Court dated May 6, 1976
which granted the motion of defendant Equimark Corporation, pur-
suant to Rule 12(h)(3) of the Federal Rules of Civil Procedure,
to dismiss the amended complaint on the ground of absence of sub-
ject matter jurisdiction.

Dated: New York, New York
June 4, 1976

ALEXANDER, KATZ & ROSENBERG

By: /s/ JOHN M. BURNS, III
John M. Burns, III, a
member of the firm
200 East 42nd Street
New York, New York 10017
(212) 986-7730

One copy of Great Appendix (2 Vols)

Recd August 13, 1976, 4:15 P.M.

Reverend Dr. Smith

attys for left - appellee

By Mary R. K. Atman